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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

Nos. 292

JOHN FRANCIS KEENAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

JAMES E. KEENAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MARK KEENAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CHAMPLIN & SEALY COMPANY, CHICAGO

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners, John Francis Keenan, James E. Keenan and Mark Keenan, pray that a Writ of Certiorari be

issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above cases.

JUDGMENT AND OPINION OF COURT BELOW.

The judgments of the United States District Court, for the Northern District of Illinois, Eastern Division, were entered on January 29, 1958, and are not reported, but appear in the printed Appendix filed with, and certified by, the Clerk of the United States Court of Appeals as a part of the record, at Page 304.

The Opinion of the United States Court of Appeals for the Seventh Circuit, affirming the said judgments, was filed on March 26, 1959, and was amended on June 11, 1959. The Opinion, as amended, is not yet reported, but is set forth in the Appendix hereto, and in the certified copy of the record.

JURISDICTION.

On June 11, 1959, the United States Court of Appeals for the Seventh Circuit entered its Order denying a Petition for Rehearing in this cause. On July 1, 1959, Mr. Justice Tom C. Clark extended the time for filing the Petition for Writ of Certiorari to and including August 10, 1959.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Whether the test in determining if a sufficient and an effective net worth and expenditure case has been introduced by the Government is determined by the good faith

or lack of good faith of the Government in the adoption of such proof rather than the formula set forth by this Court in the case of *Holland* v. *United States*, 348 U. S. 121.

2. Where there has been an absolute failure to prove a net worth and expenditure case against the petitioner, John Francis Keenan, is the introduction of numerous documents and the testimony of numerous witnesses, otherwise inadmissible, so prejudicial that the verdicts of the jury should be set aside, not only against the petitioner, John Francis Keenan, but also against the petitioners, James E. Keenan and Mark Keenan.

3. Whether the withdrawal of seven overt acts charged in the conspiracy count of the indictment by the Government at the close of its case in chief, and the rewriting of said conspiracy count by the District Court Trial Judge, omitting the said seven overt acts, was an unauthorized and fatal amendment of the original conspiracy count as returned by the Grand Jury, and whether such amendment deprived the Court of the power to try the defendants on the said conspiracy count.

4. Whether the payment of salaries to the officers and employees of the defendant, Champlin-Shealy Company, on a contingent and percentage basis of the sales, otherwise sound in principle, becomes suspect and subject to criminal sanctions because the resolutions fixing such compensation is based on sales commissions, rather than on gross sales.

5. Where petitioner, John Francis Keenan, filed a plea that prosecution on Count 11 was barred by the Statute of Limitations, did an amended plea reading, "the defendants, for a defense in bar of said indictment, allege that none of the acts or offenses charged against them in said count occurred within six years next preceding the return of the indictment herein" refer to the entire indictment or to a particular count thereof.

6. Was the Statute of Limitations tolled with respect to two counts of the indictment by a complaint filed with the United States Commissioner for the Northern District of Illinois, Eastern Division, pursuant to Section 3748(a) of the Internal Revenue Code of 1939, if no subpoena or summons was ever served on petitioner, John Francis Keenan?

7. Whether there was any proper and sufficient overt act charged in Count 11, the conspiracy count, pursuant to the mandatory requirement of the Federal Conspiracy Statute.

8. Whether the Prosecuting Attorney was guilty of such prejudicial misconduct throughout the trial, particularly in remarks to the jury, both in his opening statement and in his closing argument, and in the introduction of Government testimony and in the cross examination of the petitioners and their witnesses, so as to require a reversal of the judgments against the petitioners.

9. Whether the petitioners were prejudiced and deprived of a fair trial by the admission into evidence, over objection by petitioners, of statements made by the five defendants prior to indictment, to Internal Revenue Agents at the request of the said agents, and of testimony given by James E. Keenan, Mark Keenan and two other defendants before the Grand Jury which indicted them.

10. Does the failure to make a motion by the petitioners for a severance and for a separate trial answer the claim of petitioners that the jury was so confused that it could not render proper verdicts because:

(a) More than three hundred government exhibits and the testimony of numerous witnesses were admitted for the sole purpose of proving a net worth and expenditure case against the defendant, John Francis Keenan.

(b) The five statements of the defendants made to the Internal Revenue Agents at the request of the said agents, out of the presence of the other defendants and without their respective approval or ratification, were admitted, over objections, against all of the defendants and three other such statements were admitted only as to the defendant giving the same.

11. Whether the petitioners were deprived of due process of law as the result of the approval by the Court of Appeals of the admission into evidence in behalf of the Government of the Grand Jury testimony of four defendants on the ground that they were exculpatory statements and thereby avoiding a review of the Trial Court's ruling that the said Grand Jury testimony was admissible against the said defendants as admissions against interest.

12. Whether the United States Court of Appeals properly held that the conspiracy charged continued to the return of the Indictment herein and, by reason of said holding, approved the admission of evidence at the trial, particularly the Grand Jury testimony of the defendants with respect to matters that occurred subsequent to the date of the termination of the conspiracy.

13. Whether the Grand Jury testimony of the petitioners, James E. Keenan and Mark Keenan, given under the coercion of a Grand Jury subpoena and the remarks of the Senior Judge of the District Court, directing the petitioner to answer questions put to him before the Grand Jury, was admissible at the trial, either as an exculpatory statement or as an admission against interest.

14. Whether the petitioners, James E. Keenan and Mark Keenan, were putative or targeted defendants at the time they were subpoenaed to testify before the Grand Jury and at the time they testified before the Grand Jury so as to

render their Grand Jury testimony inadmissible, on objection, at the trial of an indictment against them returned by the Grand Jury before which they testified.

15. Did the District Court err in refusing to give an instruction tendered by petitioner, Mark Keenan, presenting to the Petit Jury for their determination whether a government agent employed practices of fraud or deceit to elicit a statement from the said petitioner?

16. Did the District Court err in not permitting the attorney for petitioner, Mark Keenan, to argue to the Petit Jury, in summation, the practice of fraud and deceit by a government agent in eliciting a statement from the said petitioner?

STATUTES INVOLVED.

The pertinent Statutes involved in this cause are:

Title 26, U. S. C., Section 145(b) (Internal Revenue Code)

Title 26, U. S. C., Section 145(d) (Internal Revenue Code)

Title 26, U. S. C., Section 3748 (Internal Revenue Code)

Title 18, U. S. C., Section 371 (Criminal Code)

Ill. Rev. Stat. Chap. 24, Sec. 9-91.

Rules 5(b) & (c), Rules of Criminal Procedure.

These provisions are set out in full in the Appendix hereto.

STATEMENT OF THE CASE.

On April 30, 1957, an Indictment was returned in the United States District Court for the Northern District of Illinois (R. 4-16). The Indictment consisted of 11 counts. The petitioner, John Francis Keenan (hereinafter called Frank Keenan), was charged in Counts 1, 2 and 3 with having wilfully attempted to evade and defeat a large part of his personal income taxes for the calendar years of 1950, 1951 and 1952. In Counts 5, 6 and 7 he was charged with wilfully attempting to evade and defeat the taxes of Champlin-Shealy Company, a corporation, for the same years. Since Frank Keenan was found not guilty on Counts 8, 9 and 10, the contents of these counts are not recited herein. Count 11 charged a conspiracy, from December 30, 1944 continuously to the return of the Indictment, against Frank Keenan, his brothers, James Keenan and Mark Keenan, and his sons, George Keenan and Edward Keenan. The Champlin-Shealy Company was named as a conspirator but was not indicted in said Count 11. Count 11 charged a conspiracy to commit certain offenses against the United States as follows: Wilfully attempting to evade and defeat a large part of the income and excess profits taxes due by Champlin-Shealy Company during the calendar years 1945 to the date of the Indictment; to evade and defeat a large part of the income taxes due by the defendant, Frank Keenan, for the years 1945 to the date of the return of the Indictment.

Twenty-one overt acts were charged for the purpose of carrying into effect the object of the conspiracy. The first five overt acts charged the commission of the said overt acts on December 1, 1950 (Overt Act No. 5) and on dates prior thereto. On May 23, 1957 (R. 22) the Petitioner,

Frank Keenan, filed a plea of the Statute of Limitations as to Count 11 (R. 25, 26). On June 26, 1957, Frank Keenan filed an amended plea of the Statute of Limitations reading, "For a defense in bar of *said Indictment*, allege that, none of the acts and offenses charged against them in *said count* occurred within six years next preceding the return of the Indictment herein (April 30, 1957) and are barred by the Statute of Limitations." On said date, he also moved to strike all of the overt acts from the conspiracy count (R. 41-42).

The jury found Frank Keenan guilty on Counts 1 to 7, inclusive, and not guilty on Counts 8, 9 and 10. Petitioners, Frank Keenan, James Keenan and Mark Keenan were found guilty on Count 11, the Conspiracy Count. The defendants, Edward Keenan and George Keenan, were found not guilty on said Count 11. Frank Keenan was sentenced to imprisonment for a period of two years on each of said eight counts, the same to run concurrently; he was fined $7,000.00 on each count, the said sums to be cumulative, therefore totalling $56,000.00. James Keenan and Mark Keenan were sentenced to imprisonment for one year and one day, and were each fined $5,000.00 (R. 301-305).

STATEMENT OF FACTS.

The trial began on November 5, 1957 (R. 319) and ended on the day of the return of the verdicts by the jury on December 21, 1957 (R. 371). The transcript of evidence consisted of 5,364 pages (R. 3430). The Government's exhibits are contained in eight large boxes (R. 317). The Government introduced approximately 420 exhibits. Most of these were group exhibits containing in excess of 4,000 unit documents. These were the income tax returns of all of the defendants and of Champlin-Shealy Company. Some of them running as far back as 1945; the certificates of assessment against the foregoing parties, those of defendant, Frank Keenan, running as far back as 1922, the corporate minute book of Champlin-Shealy Company, its stock record, its general journals, its cash receipts books, ledgers, payroll records, time books, check stub books of Champlin-Shealy Company with respect to over 17,000 checks, cancelled checks, records of the Public Service Leader owned by Frank Keenan; bank records of various defendants, bank deposit slips and a great deal of other similar documentary evidence. A detailed description of the same would unduly extend this Petition.

The Government attempted to prove its case against Frank Keenan with respect to the first seven counts, by proof of direct fraud *and* by the Net Worth and Expenditure Method.

Champlin-Shealy Company was purchased by Frank Keenan in December, 1944, at a cost of about $65,000.00 (R. 2825); it was reorganized as a new company on February 1, 1945 (R. 773). Frank Keenan was elected the first President and Director. On February 27, 1945, he resigned and James Keenan became President and Director. (R. 774).

The latter resigned on November 24, 1950 (R. 775) and Frank Keenan became President on December 1, 1950.

A resolution passed by the company fixed the salary of James Keenan beginning January 1, 1947, at $200 per week, and in addition thereto he was to receive a commission of 7% of the gross sales for 1947. At the meeting of directors held November 28, 1940, the company authorized the purchase of 167 shares of the company from James Keenan for $75,000. At this meeting a total commission of 14% was authorized to be paid for securing sales, to be divided as follows: Frank Keenan 2%; Mark Keenan, 6%; George Keenan 6% (R. 944).

At a meeting held July 9, 1951, "the salaries, bonuses and commissions" voted at the last meeting just cited were authorized to continue for the balance of the current year "or until the further order of the Board of Directors" (R. 945-946).

In 1945 the total receipts of the company were $94,872.76; in 1946 the total billing was $183,697.73; in 1947 the total billing was $287,026.37 (R. 1054). In 1948 the total billing was $364,993.55; in 1949 it amounted to $422,725.65; in 1950 it was $478,202.31; in 1951 the total billing was $499,973.07; in 1952 it was $404,446.67; in 1953 it was $416,228.79; in 1954 it amounted to $497,392.87 (R. 1055-1056).

One of the principal witnesses for the Government was Pauline Ross. She testified to certain group exhibits. These were company checks given to a certain payee who would endorse them and return the checks to her. She in turn would cash them and ultimately Frank Keenan received these checks. On some occasions Frank Keenan would tell her to place the money in a safe deposit box at the American National Bank (R. 780-781).

A great number of sales expense checks were made out to cash; this started on April 4, 1945 and continued to December 31, 1954. The checks started out in the amount of $150; in July, 1947, the amount was increased to $300, and in April of 1950 to $400 (R. 783-786). With respect to the $400 checks, she would cash them and then purchase a cashier's check for $100 payable to the North Shore National Bank and deposit it in the account of James Keenan. She gave the other $300 to Frank Keenan (R. 787-788).

All income tax returns of Champlin-Shealy Company were prepared by its auditor, Karl Kaempfer. None of the Keenans ever told Pauline Koss to make any entries on the books; she never made a false entry; every dollar that Champlin-Shealy took in or paid out was shown on the books offered in evidence (R. 1101-1102).

James and Frank Keenan brought in most of the business of Champlin-Shealy Company up to and through 1950. (R. 870, 1053-1056).

Government Agent Levin testified that James Keenan received a salary of $10,400 for 1946 and 1947; $10,600 in 1948; $10,400 in 1949 and $9,600 in 1950. In addition thereto, his account was credited with commissions of $20,091.85 in 1947; $25,549.55 in commissions for 1948; $29,590.80 in commissions for 1949, and $29,655.61 for commissions in 1950. During these years, securities were purchased for Frank Keenan from funds credited to his account (R. 1943-1948).

Frank Keenan and all of the girls in the office had the combination to the safe in the office of the Champlin Shealy Company but James Keenan did not. Once when he did learn it, Frank Keenan had it changed (R. 889-890).

James Keenan loaned all of the *commissions* he received to his brother, Frank. In 1954 he estimated that Frank

owed him about $85,000.00 and he told a Special Government Agent that he had notes covering these loans (R. 91-96).

Mark Keenan was never a director or officer of Champlin-Shealy (R. 2671, 1126). He received no salary nor did he have an expense account (R. 2588-2591, 2554, 810). He was compensated by a percentage of the sales, in accordance with corporate resolutions (R. 920, 921, 932, 944).

Government's Exhibit 409, a certified copy of which has been forwarded to this Court, shows that a total slightly in excess of $174,000.00 was paid to Mark Keenan as sales commissions from 1946 through 1954, and a little more than $104,000.00 was paid to James Keenan as sales commissions for the years 1947, 1948, 1949 and 1950. For the years 1947 through 1950 Edward Keenan received a total of $26,324.00, and George Keenan received $121,723.00 for the years 1950 through 1955. It is undisputed that most of these sales commissions were turned over to Frank Keenan.

The Government claims that these moneys constituted income to Frank Keenan, and introduced the computations of Government Agents to show what Frank Keenan's additional income should have been for the years 1950, 1951 and 1952 if these moneys turned over to him constituted additional income. The Government also introduced computations to show the amount of increased income tax that should have been paid by Champlin-Shealy Company for the years 1950, 1951 and 1952 if the sales commissions and expense checks had not been deducted from its gross income. The resulting figures from these computations are set forth with substantial accuracy in Counts 1 through 7 of the indictment (R. 4-9). The defendants' testimony indicated that these moneys turned over to Frank Keenan were loans to him by the other defendants. Interviews between Government Agents and the defendants were introduced into

evidence *by the Government*, and in these interviews the defendants stated that the moneys received by Frank Keenan from his brothers and sons were loans to him by them.

The testimony of the defendants, Mark Keenan, James Keenan, George Keenan and Edward Keenan, before the Grand Jury from April 9, 1957 through April 29, 1957, was introduced in evidence and read to the jury over objection. An interview that Mark Keenan had with Government Agent Simon Levin on February 4, 1957, and one between Levin and Edward Keenan on February 6, 1957, were introduced into evidence and read to the jury. These interviews and the testimony of the aforesaid defendants before the Grand Jury are pleaded as overt acts 15 through 21 to effect the object of the conspiracy count (R. 16). At the conclusion of the Government's case its attorney withdrew overt acts 15 through 21 (R. 2082).

Karl Kaempfer was the accountant for Frank Keenan and Champlin-Shealy Company. In July of 1952 Government Agent Forman called on Frank Keenan at the Champlin-Shealy office. This was the first time, according to Keenan, that any fraud was suspected, and Frank Keenan told Kaempfer to give Mr. Forman all the books and records and anything he wanted (R. 2130-2131). He also told Miss Ross to give Mr. Forman anything he desired.

James Keenan testified that when he first became associated with Champlin-Shealy Company he solicited old accounts, legal associations, individual attorneys, the Sanitary District, the School Board, the City of Chicago, and Labor Unions. He solicited business in various cities from Unions, and expended his personal funds (R. 2244-2245). The expense money he received from Champlin-Shealy was

spent in creating good-will. Champlin-Shealy invested in oil and gas ventures and in the construction of roads, refineries, and in oil and mineral rights in Venezuela (R. 2259-2260). He spent his own and Champlin-Shealy's money for the expenses to the extent of $35,000.00 or $40,000.00. He produced his checks issued in 1949 to the order of various hotels, totalling almost $4,400.00, which was spent on business for Champlin-Shealy. He produced additional checks spent for Champlin-Shealy during the year 1950 (R. 2285-2291). The business he obtained and the additional moneys that he spent out of his own pocket for expenses are set forth in detail (R. 2348-2434). Some of these expenses were paid from the proceeds of a weekly expense check that he obtained from Champlin-Shealy.

Frank Keenan was elected an Alderman of the 49th Ward of Chicago in 1935 and held that office for sixteen years. He was also elected Ward Committeeman in 1936; in 1950 he was elected a member of the Board of Tax Appeals; and in 1954 he was elected Assessor of Cook County (R. 2799-2802). Frank Keenan testified that he received no salary from 1944 to 1950 with the exception of money that James Keenan gave him on not more than twenty occasions in repayment of money that he expended (R. 2825-2826).

After the defendants' briefs had been filed, a Supplemental Record was filed in the Court of Appeals on January 19, 1959, by the Honorable Casper Platt, Judge of the United States District Court for the Eastern District of Illinois, before whom this cause was tried, on his own initiative. In said Supplemental Record, Judge Platt stated that he had prepared a copy of the indictment during the trial of the case of *United States of America* v. *John Francis Keenan, et al.*; that in this copy he eliminated the last seven overt acts of the conspiracy count and sent this modi-

fied copy of the indictment to the jury during their deliberations, and that the jury was not given the original indictment containing twenty-one overt acts.

The said Supplemental Record contained an order that the Clerk of the United States District Court for the Eastern District of Illinois certify and forward to the Court of Appeals the said statement of Judge Casper Platt and the said modified copy of the indictment, and also ordered the Clerk of his Court to supply the record with a Complaint filed before the Commissioner Bentley Pike on March 13, 1957, pursuant to Section 3748a, Internal Revenue Code 1939, 26 U. S. C. A. The said Supplemental Record included both a copy of the said modified indictment with the aforesaid overt acts eliminated from the conspiracy count thereof and the said Complaint filed with the said Commissioner Bentley Pike on March 13, 1957.

REASONS FOR GRANTING THE WRIT

I.

The opinion of the Circuit Court of Appeals has decided a federal question involving the proof by the Government necessary to show income tax evasion by introduction of a "net worth and expenditure" case, which is in conflict with an applicable decision of this Court, *Holland* v. *United States*, 348 U. S. 121. The opinion of the Court of Appeals states:

> "Frank Keenan strongly urges that the great amount of testimony and evidence introduced for the purpose of proving a 'net worth' case was prejudicial error; that the large volume of exhibits received in evidence confused and overwhelmed the jury.
>
> "The Government did endeavor to establish its case by two lines of proof; a) specific items of unreported income, and b) the net worth method. With the proof so clear as to specific items of unreported income, it *is* somewhat difficult to understand why resort was had to the net worth method. However, there may well have been reasons sufficient in the minds of those in charge of the prosecution why it was prudent to have two strings to their bow. In any event, we cannot say there was prejudice to the defendants amounting to reversible error where no lack of good faith is evident in the adoption of the trial strategy which was used."

The bill of particulars furnished the defendants stated that the starting point of the "net worth" case was December 31, 1949 (R. 1683-1684; 3407). Government's Exhibit No. 414, prepared by agents Denby and Levin, according to Mr. Levin's testimony, was based *exclusively* on evidence, documents and records that were introduced in the case (R. 1965-1966) (a certified copy of this exhibit has been for-

warded to this Court). The second page of this Exhibit 414 sets forth an understatement of net income by Frank and Georgia Keenan, as follows: For the year 1950, $41,470.17; for the year 1951, $44,076.76; and for the year 1952, $30,113.79.

In arriving at these figures Government Agent Levin testified to the formula he used (R. 1961):

> "A person's net worth can be defined as the excess of his assets over his liabilities, or the difference of what he owns over what he owes.
>
> "Now a simple example might be if a man has $2,000.00 in a bank account and he owns a car which cost him $3,000.00, and he owns a home which cost him $20,000.00; his assets would be $2,000.00 plus $3,000.00, plus $20,000.00, or $25,000.00.
>
> "If he owes $1,000.00 to the finance company on the car and has a $10,000.00 mortgage on the home, his liabilities would be $11,000.00.
>
> "Subtracting the $11,000.00 from $25,000.00, his net worth would be $14,000.00."

In the preparation of Government's Exhibit 414, however, Mr. Levin did not follow this formula.

Among the documents in evidence was Government's Exhibit No. 348 (a certified copy of which has been forwarded to this Court). This was prepared by Government Agent Forman, and shows the assets and liabilities of Frank Keenan from 1943 through 1952. In connection with the preparation of this exhibit Mr. Forman testified that he made a fairly detailed audit of the Champlin-Sheaty books and records, and a very detailed examination of Frank Keenan's personal books and records and of companies and organizations in which he had an interest. All of the records were made available to him (R. 2689-2690). For the year ending December 31, 1949 (the Government's starting

point), Exhibit 348 discloses a loans payable item of $35,466.58. This item does not appear in the "net worth" statement (Exhibit 414). None of these loans as shown in Exhibit 348 were *from Mark Keenan, James Keenan, George Keenan* or *Edward Keenan.*

Since Mr. Levin stated that his computation of Frank Keenan's net worth and the summary thereof, as set forth in Exhibit 414, was based *exclusively* on evidence, documents and records that were introduced in the case, he should have included this loans payable item, as shown on Exhibit 348, owed by Frank Keenan as of December 31, 1949.

It, therefore, appears conclusive that the arbitrary exclusion of this loans payable item of $35,466.58 from Exhibit 414 destroyed every vestige of necessary accuracy in the starting point.

Exhibit 348 discloses a loans payable account of $39,231.29 for the year 1950. This does not appear on Exhibit 414 among the liabilities of Frank Keenan for the year 1950. The understatement of income for 1950 on the "net worth" statement (Exhibit 414) is $41,470.17. If this item were deducted from the understatement of net income for the year 1950 in the amount of $41,470.17, the net difference in the understatement would be $2,038.88.

Exhibit 348 shows an asset of securities in the sum of $145,359.57; Exhibit 414 shows that item to be $147,469.57, which increases the net worth of Frank Keenan for the year 1950 by $2,110.

In Exhibit 348, the investment in Champlin-Shealy is shown as $52,106.59 for 1950. However, Exhibit 414 discloses this investment in the sum of $54,116.95. The increase in net worth shown in Exhibit 414 with respect to Frank Keenan's investment in Champlin-Shealy Company is $2,010.36.

There is no explanation by any Government witness why the securities were increased by $2,110 in this exhibit, nor why the investment in Champlin-Shealy is increased by $2,010.36.

The foregoing arbitrary increases of $2,110 and $2,010.36 in Frank Keenan's net worth, if eliminated from Levin's computations, would remove even the foregoing understatement of $2,038.88.

Mr. Levin's explanation as to why he omitted these loans from his summary is that he "requested Mark Keenan, George Keenan and Edward Keenan to bring in verification of the amounts, and he never received the same, and he was not satisfied with the information these defendants gave about the loans 'based on all of the evidence in the case'" (R. 2042-2043). Details of the loans payable account, as shown on the second page of Exhibit 348, from the year 1943 through 1951, are shown in a separate analysis attached to Exhibit 348, page AA. None of these items had anything to do with Mark Keenan, George Keenan and Edward Keenan, and needed no verification from them.

Another defect in the Government's "net worth" case is the omission therefrom of an asset belonging to Frank Keenan which was known to the Government. Reference to Government's Exhibit 348 indicates conclusively that Special Agent Forman included the cash surrender value of Frank Keenan's life insurance policies with the Travelers Life Insurance Company among his assets from the years 1943 through 1949; in 1943 it amounted to $14,561.65, and it increased yearly until it amounted to $28,223.60 in 1949. Here the Government *knew* of this asset, and Special Agent Levin did not include it in his "net worth" computation and summary.

In *Holland* v. *United States*, 348 U. S. 121, 132, this Honorable Court stated:

> "We agree with petitioners that an essential condition in cases of this type is the establishment with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset."

In the case of *Steele* v. *United States*, 222 F. 2d 628, where a "net worth" case was sought to be established, the defendant contended that it was error for the Government Agent to undertake to evaluate the testimony and evidence, as did Agent Levin in the instant case. The defendant contended, in the *Steele* case, that because of the evaluation of the testimony by the Government Revenue Agent, the Government was enabled to invade, and to take over the province of, the jury. The Court accepted the defendant's contention, and reversed the case "for the glaring errors with respect to these so-called exhibits" (page 631). See also *Flemister* v. *United States*, 260 F. 2d 513, 517-518.

More than 300 voluminous books and group exhibits were introduced in evidence by the Government in an attempt to prove its "net worth" case. It is impossible to evaluate the prejudice to Frank Keenan to have their contents disclosed to the jury, and to send them into the jury room, when the ultimate purpose for their admission has failed.

The foregoing situation, counsel believes, justifies a reversal of the judgment against Frank Keenan on all of the counts, including the conspiracy count. Notwithstanding that a good many of these Exhibits were introduced as to Frank Keenan only, they might have been considered by the jury as evidence against all of the defendants on the conspiracy count.

The opinion of the Court of Appeals in ignoring the failure of the Government to prove its net worth and expenditure case, and in concluding that there was no reversible error in the said net worth case "where no lack of good faith is evident in the adoption of the trial strategy which was used," is in direct conflict with the decision of this Court in the foregoing case of *Holland* v. *United States*, 348 U. S. 121, and with the foregoing cases of *Steele* v. *United States*, 222 F. 2d 628 and *Flemister* v. *United States*, 260 F. 2d 513, 517-518. The Court of Appeals has adopted and sanctioned a departure from the decision of this Court and of other Courts of Appeal, which calls for an exercise of this Court's supervision.

Serious questions are presented to this Honorable Court under its supervisory powers to determine (1) whether the introduction of numerous documents and the testimony of numerous witnesses for the purpose of proving a "net worth" case against Frank Keenan, which are otherwise inadmissible, is so prejudicial that the verdicts of the jury should be set aside, not only against the petitioner, Frank Keenan, but also against the petitioners, James E. Keenan and Mark Keenan; (2) whether the jury's verdict could have been based on the "net worth" case, which the Government failed to prove, or on the so-called specific items of the unreported income.

II.

After the defendants' briefs were filed in the Court of Appeals, a Supplemental Record was filed by the Honorable Judge Casper Platt on January 19, 1959. This Supplemental Record stated that Judge Platt deleted from Count 11 (the conspiracy count) overt acts 15 through 21. The Supplemental Record indicates that this amended or modi-

fied indictment was sent to the jury and that the original indictment *was not* sent to the jury. Counsel for the petitioners contend that Count 11, in the form in which it went to the jury, was an unauthorized and fatal amendment of the original Count 11 as returned by the Grand Jury. The Government's attorney withdrew these overt acts at the conclusion of its case (R. 2082). During the discussion as to the disposition of these overt acts and the manner in which they would be withheld from the jury's consideration, counsel for petitioner, Frank Keenan, suggested that it would be better to delete them (R. 3188-3189). Examination of the original indictment indicates that the Court did not block out overt acts Nos. 15 through 21.

Since the Supplemental Record was filed after the petitioners' briefs had been filed in the Court of Appeals, and since there was nothing in the record prior to the filing of the Supplemental Record showing that overt acts 15 through 21 had been deleted from the original indictment, the petitioner, Frank Keenan, was first able to argue that the said modified indictment was a fatal amendment to Count 11, as returned by the Grand Jury, in his reply brief. A certified copy of Frank Keenan's reply brief is forwarded to this Court with the record, to show to this Court that the question was raised in the Court of Appeals at pages 31-35 thereof. The Court of Appeals, however, makes no comment on this point in its opinion.

This Court has held, in *Ex parte Bain*, 121 U. S. 1, 9, that a defendant can only be tried upon the indictment as found by the Grand Jury. This decision was followed in *Carney v. United States* (Cir. 9) 163 F. 2d 784, 788, holding that a trial court has no jurisdiction to amend an indictment returned by a Grand Jury by striking out any portion thereof; this case further held that such action deprived the

Court of the power to try the prisoner. This rule is further followed in the cases of *Stewart* v. *United States*, 12 F. 2d 524, 525 (Cir. 9); *United States* v. *Krepper*, 159 F. 2d 968, 970 (Cir. 3); *United States* v. *Norris*, 281 U. S. 619, 623; *Edgerton* v. *United States*, 143 F. 2d 697, 698.

The consent of defendant's counsel to the deletion of the six overt acts does not affect the rule. *United States* v. *Norris*, 281 U. S. 619, 623, 50 S. Ct. 424, 74 L. Ed. 1076; *Carney* v. *United States*, 163 F. 2d 784, 789; *United States* v. *Krepper*, 159 F. 2d 968, 970.

The omission of the foregoing point from consideration by the Court of Appeals calls for the invasion of the supervisory power of this Court, particularly since it seems manifest from the foregoing facts and cases cited that the Court of Appeals, if it considered the question presented, might well have concluded that the modified indictment constituted an amendment of the original indictment, and that the indictment could not be amended without reassembling the Grand Jury, and that in modifying and amending the indictment, the District Court deprived itself of jurisdiction to try all of the defendants on Count 11, the conspiracy count.

III.

The Government's theory in this case is that the payment of sales expenses and sales commissions to the defendants constitute criminal acts. The Government took the position that none of the defendants were entitled to the same. For this reason it claims that Champlin-Shealy Company had no right to take deductions for sales expenses and sales commissions in its income tax returns for the calendar years of 1950, 1951, and 1952. Since these deductions were made, the Government insists that a crime was committed by

Frank Keenan, who as President of Champlin-Shealy Company signed its income tax returns for the foregoing years. This is the Government's position with reference to Counts 5, 6, and 7 of the indictment.

With respect to Counts 1, 2, 3 and 4 of the indictment, the Government takes the stand that if James Keenan, Mark Keenan, Edward Keenan, and George Keenan received these sales expenses and sales commissions, and delivered the same to Frank Keenan, this should have been reported by Frank Keenan in his returns for 1950, 1951, and 1952. The Government takes the further position that James, Mark, Edward, and George Keenan had no right to loan any of the sales expenses and sales commissions to Frank Keenan. The defense of Frank Keenan was that the sales commissions received by him from his brothers and sons were loaned to him and did not constitute income to him.

Section 162(a)(1) of the Internal Revenue Code of 1954, as does section 23(a)(1)(A) of the 1939 Code, lists as one of the ordinary and necessary trade or business expenses, the deduction of which is permitted, "a reasonable allowance for salaries or other compensation for personal services actually rendered." As emphasized by the Regulations: (1) the requirement that the compensation be reasonable in amount is a fundamental one; (2) the payment must be made "purely for services"; (3) the facts behind the payment, and not the form of label attached to it, control the question of deductibility; and (4) the method of fixing the amount of compensation, though frequently important, is not decisive. Reg. 118, Sec. 39.23(a)(6).

The standard of reasonable compensation is almost as elusive as the concept of the hypothetical reasonable man in the law of torts. It all depends upon the circumstances of

the time, the place and the persons concerned. In short, reasonableness is a question of fact. This was so held in the case of *Miller Mfg. Co.* v. *Commissioner of Internal Revenue*, 149 F. 2d 421, 423 (Cir. 4).

In *Commercial Iron Works* v. *Commissioner of Internal Revenue*, 166 F. 2d 221, the Court listed the ratio of officers' salaries to gross sales for the fiscal years from 1937 to 1942. They amounted for the years just mentioned, respectively, to 32%, 36%, 38%, 25%, 21%, and 65%. The total sales varied respectively in those years from $3,750,00 in 1937 to $59,500,00 in 1942. At page 224 the Court said:

> "It would not seem to be unreasonable business practice for an employer to recognize and reward sacrifices made by employees in the hard, formative days by granting a more generous compensation in the days that are lush. Neither the statutes nor the regulations seem to require that this be done, unless they impliedly contain the concept that that which is right and that which is just would also be reasonable."

In *Manson Mfg. Co.* v. *Commissioner of Internal Revenue*, 178 F. 2d 115 (Cir. 6), the Court noted at page 121:

> "The policy of agreeing to pay a percentage of the earnings before they are earned, or even a sum in the nature of a bonus after they are earned, *is based primarily upon sound business principles.*" (Italics ours.)

In the *Manson Mfg. Co.* case the Court further stated at page 121:

> "* * * If the compensation received * * * was unreasonable for the services rendered, certainly the government could have produced some experienced witness * * * who would have said so. The lack of such evidence operates very strongly against the defendant's contention."

The Government failed to put any expert witness on the stand to testify that either the sales expenses or the sale

commissions paid by Champlin-Shealy Company were unreasonable. Karl Kaempfer, a Government witness, however, testified that commissions might vary from 10 to 20 per cent for the purpose of building up a business (R. 1563-1564). One expert witness for the defendants testified that the usual sales commissions paid by printing companies in the City of Chicago was 10 to 15 per cent, and the allowance of sales expense was from 5 to 7 per cent (R. 2216-2220). Another expert witness for the defendants stated that the customary commissions were from 10 to 15 per cent, and the sales expense ran to 10 per cent (R. 2221-2227).

The business of Champlin-Shealy Company, after the Keenans purchased the same, amounted to $94,872.76 in the year 1945. This increased year by year until in 1950 it was $478,202.31, and in 1954 it was $497,392.87 (R. 1055-1056).

Government's Exhibit 409 indicates that *no commissions were paid* during the year of 1945 on the sales of $90,752.28. In 1946, according to the said exhibit, only 3% of the sales commissions were paid on the sales of $183,697.73. Thereafter commissions of 14% were paid each year on the increased business until 1954 when the sales commission was reduced to 10%. The same commission was paid for the year 1955 and no commission was paid for the year 1956.

The Court of Appeals held that: "The evidence supports the charge that large sums paid out by the corporation and charged to 'Sales Expense' and 'Sales Commissions' were not legitimate payments for expenses actually incurred. The jury was justified in believing such payments were merely a means of siphoning off unreported profits of the company for the personal benefit of Frank Keenan who, with his wife, was the *de facto* owner of eighty per cent of the corporate stock until 1950, and ninety per cent of the stock thereafter." (App. 7a-8a.)

It is the Government's position, and apparently the position of the Court of Appeals, that no one should be paid compensation by way of a percentage of the sales. Only James Keenan received a salary *plus* a percentage of the sales. If the decisions heretofore cited by the petitioners to the effect that the payment of compensation by a percentage of the sales is sound, then the conclusions of the Court of Appeals should be subjected to the supervisory power of this Honorable Court.

A ruling on this question goes to the heart of the Government's case and the defense of the petitioners. If James Keenan, Mark Keenan, Edward Keenan, and George Keenan earned compensation from Champlin Shealy Company by way of commissions then they could have loaned the same to Frank Keenan after their respective income taxes thereon had been paid.

This case suggests a serious danger for all business men and their companies. If there is a mistake in judgment by any executive of a company in the payment of salaries and percentage commissions and sales expenses, such mistake may be followed by criminal charges. If the payment of salaries, sales commissions and sales expenses are unreasonable in the opinion of Government agents, a company and its executives may also face criminal action. This situation should be settled by this Honorable Court in the interest of all business men and their companies.

IV.

The United States Court of Appeals, in its Opinion, states succinctly certain of the facts with respect to Frank Keenan's argument that prosecution on Counts 1 and 5 of the Indictment are barred by the Statute of Limitations (App. p. 8a):

Frank Keenan claims that the charges against him in Counts 1 and 5 are barred by the statute of limitations. Count 1 charges commission of the offense therein described "on or about the fifteenth day of March, 1951." The individual tax return of Frank Keenan and wife was filed March 14, 1951. Count 5 charges that on or about March 15, 1951, Frank Keenan attempted to evade and defeat the taxes due by Champlin-Shealy Company for the year 1950. This return was filed March 13, 1951.

The indictment herein was returned on April 30, 1957, six years and forty-six days after the date of the commission of the offenses described in Counts 1 and 5. The pertinent statute of limitations bars prosecution after six years except "Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended * * *" Section 3748a, Internal Revenue Code 1939, 26 U. S. C. A.

A supplement to the record shows that a complaint was, in fact, filed before a Commissioner on March 13, 1957. However, it is undisputed that this complaint or the record thereof was not in the District Court files at the time of the trial. Government's counsel and counsel for the defendants incorrectly assumed that it was on file, and the Government offered no proof to show that prosecution was not barred by the statute.

After analyzing two Fifth Circuit cases cited by the petitioner, Frank Keenan, *White* v. *United States*, 216 F. 2d 1, and *Flemister* v. *United States*, 260 F. 2d 513, the Court of Appeals stated (App. 9a):

"We do not think that either case is applicable to the situation before us. The trial judge below was never given an opportunity to rule on the point. The motion to dismiss raised the issue of the statute of limitations only with respect to Count 11. The amendment to this motion was likewise directed only to Count 11. Motions for judgment of acquittal and for a new trial did not raise the issue of limitations at all. In fact, trial counsel for Frank Keenan expressly disavowed any intention to raise the statute of limitations as a bar to the first ten counts."

"We hold that as no objections were raised in the pleadings or upon the trial, the Government was not required to prove that the prosecution was not barred by the statute of limitations. We hold further that the defendant is in no position to raise the point for the first time on this appeal. Had this point been timely raised below, there would have been ample opportunity for the Commissioner to file the records with the District Court."

The petitioner, Frank Keenan, filed a plea of the Statute of Limitations directed to Count 11 of the Indictment (R. 25-26). Thereafter, he filed an amendment to this plea of the Statute of Limitations reading as follows (R. 41-42):

"These defendants also amend their Plea of the Statute of Limitations on page 6 of said Motion to read as follows:

"'Now come the defendants, John Francis Keenan, also known as Frank Keenan, Edward F. Keenan and George W. Keenan, and for a defense *in bar* of *said indictment*, allege that none of the acts and offenses charged against them in said count occurred within six years next preceding and return of the indictment herein (April 30, 1957), and are barred by the Statute of Limitations (Internal Revenue Code of 1954).'"

Certainly, the petitioner would not have filed an amendment to his plea of the Statute of Limitations if it referred only to the same count. The amended plea of the Statute of Limitations was "in bar of said *indictment*." That seemed to have been the interpretation of both the District Court and Mr. Gliedman (R. 2085-2086).

During the argument on motions for judgment of acquittal after the Government had rested its case, the court asked defendant's counsel, "By the way, you are not raising any question about the statute of limitations applying to the 1950 report of Mr. Frank Keenan, are you?" (R. 2085.)

Mr. Busch answered, "No—Yes, I am." Mr. Gliedman said, "His Honor is asking you with reference to Counts 1 and 2 are you contending about the statute of limitations?" To which Mr. Busch replied, "Oh, no." The court then stated: "Well, that's all right. I believe there was six years from the time the 1959 was filed, but there was a complaint issued here. Was there a complaint?" Mr. Gliedman replied, "Yes, your Honor. There is a complaint which I understand *is part of the record of this case and is deemed to be taken judicial notice of.*" (R. 2086.)

As stated by the Court of Appeals, the District Court and all counsel incorrectly assumed that Commissioner Pike had complied with Rule 5(c) of the Federal Rules of Criminal Procedure and had filed the complaint before him with the Clerk of the District Court.

In the Supplemental Record filed by Judge Casper Platt, it appears that he ordered his clerk, on January 16, 1959, to forward the Commissioner's Complaint to the Court of Appeals. This Supplemental Record also shows that Commissioner Pike's Complaint was filed in the District Court for the *first* time on January 13, 1959. This Supplemental Record also shows that no Commissioner's subpoena or summons was served on Petitioner, Frank Keenan. The Court of Appeals states that had the Statute of Limitations been timely raised below, there would have been ample opportunity for the Commissioner to file the Records of the District Court (App. 9a). At no time, however, would the filing of the Commissioner's Complaint with the Clerk of the District Court satisfy the requirement that Petitioner, Frank Keenan, should have been served with a Commissioner's summons or subpoena before the Complaint could be considered as "instituted before a Commissioner." This rule is stated in four District Court cases:

United States v. *Freeman*, 165 F. Supp. 121, citing cases at Page 124; *United States* v. *Jurzykowski*, 159 F. Supp. 710; *United States* v. *Montgomery*, 158 F. Supp. 267, 270-271; *United States* v. *Rully*, 136 F. Supp. 881, 883.

No decision of any Court above the District Court seems to have decided this point. It therefore becomes of the utmost importance that this Court determine whether a Complaint has been deemed to have been "instituted" where no summons or subpoena has been served on the party to whom it is directed. Such a decision by this Honorable Court will clarify this question for all the District Courts throughout the country.

The confusion arising from the incorrect assumption that the Commissioner's Complaint was on file in the District Court certainly should excuse the apparent waiver of the Statute by Petitioner, Frank Keenan's counsel. Similar confusion appears in the cases of *White* v. *United States*, 216 F. 2d 1 and *Flemister* v. *United States*, 260 F. 2d 513. Both of these are Fifth Circuit cases and are in conflict with the Opinion of the Court of Appeals for the Seventh Circuit, and this conflict should be resolved by this Honorable Court.

V.

In the Court of Appeals, Petitioner, Frank Keenan, argued that there was not a sufficient overt act charged in Count 11 to effect the object of the conspiracy (Count 1). See pages 91-96 of Frank Keenan's Brief and Argument in the Court of Appeals, a certified copy of which has been filed in this Court.

Overt acts Nos. 1, 2, 3, 4, and 5 were committed, respectively, on January 4, 1945, July 17, 1947, July 9, 1947 and December 1, 1950 (R. 13-14). Since the Indictment was re-

turned on April 30, 1957, (R. 1), the Statute of Limitations runs against these overt acts, and the Court so instructed the jury (R. 3417-3418). Overt acts 15 through 21 occurred after the termination of the conspiracy, and, therefore, none of those acts constitute a sufficient overt act in furtherance of the conspiracy. *Grunewald v. United States*, 353 U. S. 391, 398-399. Overt acts 10 through 14 are interviews between certain named defendants and Special Agents of the Government made on various dates from March 22, 1954 to April 14, 1954 (R. 15-16). Nothing appears in the allegations of these overt acts to show in what manner these interviews and statements were made in pursuance of the conspiracy.

It would be a strange and dangerous situation if interviews Government officials and agents can constitute an overt act. A conspiracy cannot exist without the commission of an overt act; yet, can a Government agent create and manufacture an overt act by merely calling in an alleged conspirator, obtaining a statement from him, and then inserting that in the conspiracy charge as an overt act? It should not be the policy of the Government to entrap a defendant into creating an overt act by merely having an interview with him and taking a statement from him. If the Government agents had not called the defendants in for an interview, these alleged overt acts would not have been created.

Overt acts 6, 8 and 9 charge a series of acts. Overt act No. 6 alleges: "On or about April 13, 1950, the corporation issued a check in the amount of $400.00, which was charged to the sales expense account on the books and records of the corporation, and thereafter and until September 29, 1954, continued to issue weekly checks in the same amount and charged to the same account" (R. 14-). All those from

April 13, 1950 to April 30, 1951, occurred prior to April 30, 1957 and are, therefore, barred by the Statute of Limitations and are not proper acts.

Overt Act No. 7 alleges a number of payments of commissions during the calendar year 1946 through 1955 (R. 14, 15). Those acts committed prior to 1950 were barred by the Statute of Limitations. There is the further vice in overt act No. 7 that the person who committed these series of "overt acts" is not named, as required by Section 371, Title 18.

Examining overt act No. 8, forty-two separate acts are alleged. With respect to Frank Keenan's income tax returns, six acts are barred by the Statute of Limitations; six of those alleged with respect to James Keenan are barred by the Statute; four of Mark Keenan's acts, all of Edward Keenan's acts; and one of George Keenan's acts are barred by the Statute of Limitations.

Logically, a group of separate, distinct acts, or a series of acts, should not be alleged as "any act" which is required by the Conspiracy Statute. In *United States* v. *Haupt* (Cir. 7), 136 F. 2d 661, at Page 665, the Court of Appeals for the Seventh Circuit stated: "* * * that an overt act must be proven as alleged. If the act consists of a chain of events, it would be more absurd to think that proof of one link would be sufficient proof of the chain."

If overt acts 6, 7, and 8 can be considered as chains, or a series of events, they must be proved as alleged. The chains must not be broken. They cannot be half good and half bad. A great portion of the events in these overt acts, as heretofore shown, was barred by the Statute of Limitations, and hence, the alleged overt acts No. 6, 7 and 8 must fall. There remains overt act No. 9 (R. 15) for analysis. This charges that Frank Keenan submitted a financial state-

ment as of December 31, 1953, to the American National Bank and Trust Company, and signed said statement on January 20, 1954. It is difficult to determine from this bare statement how this overt act was in pursuance of the conspiracy. The scope of the conspiratorial agreement determines whether the act relied on as an overt act may properly be regarded as a furtherance of the conspiracy. *Grunewald* v. *United States*, 353 U. S. 391, 397.

The failure of the Court of Appeals to discuss the foregoing important alleged defect of the conspiracy count calls for the supervisory power of this Honorable Court. This Court should further determine whether Government Agents can create overt acts by calling in prospective defendants for interviews and thus create overt acts which may be charged in a conspiracy indictment. This Court should further determine whether an overt act means what it says, "a single act," or whether a series or chain of events, some of which are barred by the Statute of Limitations, can be properly pleaded as an overt act in a conspiracy indictment within the purview of Section 371, Title 18, U. S. C.

VI.

At the beginning of the trial, over objection, the Government attorney asked the court to take judicial notice of Chapter 24, Section 9-91, of the Illinois Revised Statutes. Objection to both the court's taking judicial notice of the statute and to the reading of the same to the jury was overruled; and the statute was thereupon read to the jury (R. 513-514):

> "No municipal officer shall be interested, directly or indirectly, in any contract, work, or business of the municipality or in the sale of any article, whenever the expense, price or consideration of the contract, work, business, or sale is paid either from the treasury or by

any assessment levied by any Statute or Ordinance. No municipal officer shall be interested, directly or indirectly, in the purchase of any property which (1) belongs to the municipality, or (2) is sold for taxes or assessments, or (3) is sold by virtue of legal process at the suit of the municipality (1941, August 15, Laws 1941, Volume 2, Page 19, Section 9-91)."

No evidence whatever was introduced by the Government to prove that Champlin-Shealy Company actually received any business from the City of Chicago while Frank Keenan was an Alderman.

The only reference by the Government to the relationship among Champlin-Shealy Company, the City of Chicago, and Frank Keenan is contained in the memorandum of interview between special agents Forman and Freiberger with *James* Keenan held on March 22, 1953 (R. 1810). This memorandum recited: "He stated that the reason he held all of Champlin-Shealy Company stock in his name was because his brother, Frank, the City Alderman at the time, had been advised by an attorney that said law forbade Aldermen from doing business with the City" (R. 1812). This statement is, indeed, a far cry from proof that Champlin-Shealy did, in fact, business with the City of Chicago.

Again, on cross-examination of Frank Keenan, Mr. Gliedman asked the witness, "Didn't you, sir, learn that it was against the law for you to have an interest in the Champlin-Shealy Company while you were an Alderman?" Objection was made to that question and overruled (R. 2944). Of course, there is and was no such law preventing Frank Keenan from having an interest in Champlin-Shealy Company while he was an Alderman. The prohibition is against an Alderman having a direct or indirect interest in any company having a contract or doing work with the municipality of which he is an officer. Thereupon Mr. Gliedman indulged

in continued prejudicial cross-examination in asking the witness whether he heard James Keenan's statement read to the Jury and quoted the foregoing excerpt from James Keenan's statement to the revenue agents (R. 2944-5). The question was not impeachment of Frank Keenan's testimony and, furthermore, the witness could not be impeached under cross-examination by what another person stated outside of his presence.

A particularly vicious prejudicial statement was made by Mr. Gliedman. During the cross-examination of the defendant, James Keenan, Mr. James Keenan had testified to the serious illness of his wife. Her condition was such that "she couldn't survive; couldn't live." Mr. Keenan also testified that he travelled during his wife's illness and he was asked by Mr. Gliedman, "but your travelling around the country, if your wife was in such bad condition, why didn't you stay at home?" Mr. Keenan answered, "I travelled in the interest of Champlin-Shealy"; thereupon Mr. Gliedman asked him, "Which was more important to you, sir, to lose money for Champlin-Shealy Company, so far as your own personal finances, or to stay with your wife whom you claim was very sick?" Of course, an objection to this question was sustained (R. 2541).

Government counsel, Mr. Gliedman cross-examined Petitioner, Frank Keenan, with respect to his income tax for 1934, 1937, 1939, 1942 and 1943 (R. 2977-2982). For instance, Mr. Gliedman stated to Frank Keenan: "There is testimony in this case by Agent Harlan (R. 1664-1684) that the *maximum* that you could have had of income to you in 1937 was $7,433.83. What did you report as income?" Neither Frank Keenan nor his attorney understood what the word "maximum" meant. Mr. Keenan answered, "$7,243.82" and then Mr. Gliedman stated, "All right Sir, as against $7,433.83."

What was the purpose of this cross examination if it wasn't to show that Mr. Keenan cheated on reporting his income for the year 1937? It must be remembered that Mr. Harlan built up the income and the tax thereon of Mr. Keenan for the years 1930 through 1943—not from income tax returns for those years in the possession of the Government, since they had been destroyed, (R. 1665)—but from the Government's statements of tax assessments and payments. It is evident that the computations made by the Government witness, Mr. Harlan, were not based on income tax returns and, hence, could reflect a number of minor errors.

The defendant introduced in evidence his copies of the returns for these ancient years. There is no evidence that these copies were any different from the originals that had been filed with the Internal Revenue Service for the foregoing years.

The foregoing examination with reference to Mr. Keenan's 1937 return was not an isolated instance. In cross-examining Mr. Keenan as to his return for the year 1941 (R. 2979), Mr. Gliedman stated to Mr. Keenan that, "Agent Harlan testified that the maximum income you could have had (for 1941) was $13,384.00," and asked Mr. Keenan what he reported. Mr. Keenan replied, "$13,315.01." Mr. Gliedman stated, "As against $13,384.00," an indication to the jury that Mr. Keenan understated his income by the petty amount of approximately $79.00. And for the year 1943, Mr. Gliedman, in further cross examination, stated, "Agent Harlan figured that the maximum net income that you could have had for that year was $15,476.08." He asked Mr. Keenan what he reported and Mr. Keenan testified, "$13,757.03," an understatement of income according to Mr. Harlan's figures of about $1,700.00. This cross examination of Mr.

Keenan was unnecessary, unwarranted and prejudicial, since Mr. Gliedman knew, or should have known, that the original returns for the ancient years under discussion were identical with Mr. Keenan's copies, and that, therefore, Mr. Harlan's figures were speculative and erroneous.

In commenting upon the foregoing prejudicial conduct, the Court of Appeals stated (App. 10a):

> "Frank, as well as the other defendants, claim that the prosecuting attorney was guilty of prejudicial conduct. There is, indeed, basis for some criticism as to the manner in which the prosecuting attorney conducted himself. At times, he seemed to forget the admonition in *Berger* v. *United States*, 295 U. S. 78, 88, that a United States Attorney is the representative of a sovereignty whose obligation is to govern impartially * * * and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done * * *'"

The Court of Appeals has overlooked the obvious prejudicial effect on the jury of the unwarranted and unproved intimations that Frank Keenan committed crimes other than those charged in the Indictment. The conclusion of the Court of Appeals is such a departure from rulings of this Court concerning the requisites of a fair trial so as to call for the supervisory powers of this Honorable Court.

VII.

A most serious situation with respect to the avalanche of documentary evidence introduced against the Petitioners was presented for consideration by the Court of Appeals. It is the claim of the Petitioners that they could not have received a fair trial because of this situation and that they were deprived of a trial according to due process.

In connection with the Government's attempt to prove a "net worth" case against Frank Keenan and a conspiracy

case against all of the Petitioners, including George Keenan and Edward Keenan, who were found not guilty, there were introduced in evidence thousands of pages of Government evidence, the bulk of which is indescribable. Suffice it to say these documents comprised tax returns of each defendant; general ledgers, cash receipts, checks issued, invoice payable journals from 1945 to 1957; ledgers from 1942 to April, 1957; individual payroll records and time books from 1945 to April, 1957; over a thousand cancelled checks and check stubs; corporate records, minutes and resolutions of several corporations; over a thousand duplicate deposit slips; scores of bank signature cards; ledger sheets of loan accounts; hundreds of cashier's checks; scores of bank access cards; records of savings accounts; stockholders ledgers; brokers ledger sheets; hundreds of invoices; Veteran Administration records; United States Bureau of Public Debt records regarding savings bonds; Probate Court records; records of deeds and mortgages; hundreds of letters and correspondence; admissions and statements of the co-defendants; and other documents too numerous to detail.

In the interest of conserving space, counsel will summarize the exhibits offered in evidence. About 420 were received in evidence: about 342 were offered as against all of the defendants; 58 were admitted against Frank Keenan only (R. 401, 402, 403, 406, 425, 426, 427, 433, 436, 437, 581, 582, 612, 613, 616, 693, 702, 704, 707, 731, 733, 735, 737, 740, 742, 744, 746, 748, 749, 750, 752, 754, 1429, 1430, 1594, 1595, 1596, 1599, 1600, 1601, 1602, 1629, 1630, 1632, 1633, 1634, 1635, 1636, 1637, 1639, 1640, 1641, 1643, 1644, 1647, 1664, 1687, 1692, and 1966). Six exhibits were admitted against Frank Keenan and Edward Keenan only (R. 403, 404, 405, 459, 1530); two were admitted against Edward Keenan only (R. 1529, 1704); one was admitted against Mark Keenan only (R. 1669); one was admitted against George Keenan

only (R. 1708); and one was admitted against James Keenan only (R. 1844).

A particularly confusing situation exists with respect to the offering of interviews of the five defendants named in the indictment with special Internal Revenue agents and also with respect to the grand jury testimony given by Mark Keenan, James Keenan and George Keenan.

Government Exhibit 358, a memorandum of an interview between Internal Revenue agents Forman and Freiberger with Frank Keenan held on March 14, 1954, which was received in evidence (R. 1366), was read to the jury as being offered against all defendants (R. 1730). This interview was alleged as overt act No. 10.

Government Exhibit 357, an interview between one of the defendants, George Keenan, and Special Agents Forman and Freiberger on March 26, 1954, was received in evidence against all defendants (R. 1366; 1735). It was read to the jury (R. 1735-1739) and its primary purpose, according to its contents, was "to obtain testimony regarding the tax liability to the United States of Frank Keenan, father of the witness, and, incidentally, to obtain testimony regarding the tax liability to the United States of the witness." This is described as overt act No. 14 (R. 16).

Government Exhibit 408 was admitted solely against the defendant George Keenan, and the court stated that "It will be considered as evidence only as to George Keenan and not as to the other defendants." (R. 1707; 1741.) The entire exhibit went to the jury (R. 3427). This interview took place on February 11, 1957, and is described in the indictment as overt act No. 17. It was had in the matter of "the income tax liability to the United States of Mr. Frank Keenan * * * for the years 1944 through 1955

and the Champlin-Shealy Company * * * for the years 1946 through 1955." (R. 1741.)

The full interview appears at Record, pages 183-222. Notwithstanding the limitation that the evidence merely applied to George Keenan, examination of the interview indicates that George Keenan was asked questions regarding his father, Frank Keenan, and also with respect to James Keenan and Mark Keenan.

The grand jury testimony of George Keenan given on April 10, 1957, April 23, 1957, and April 29, 1957, was read to the jury. This was overt act No. 20 in the indictment (R. 1753-1783). At its conclusion the court instructed the jury that what had been read to them should be considered as evidence only as to the defendant George Keenan and not as evidence against the other defendants (R. 1783). A motion to withdraw a juror and declare a mistrial, made by counsel for all the defendants, was overruled (R. 1783-1784). The evidence which was read to the jury involved checks endorsed over to his father, Frank Keenan, and loans made to his father (R. 762, 764; 1778). The grand jury testimony of George Keenan appears at Record pages 1748, 1783.

Government Exhibit 356, an interview between Special Agents Forman and Freiberger with Edward F. Keenan, which took place on March 26, 1944, charges overt act No. 13 and was received in evidence against all the defendants (R. 1366; 1784). As recited therein, the purpose of the conference was to obtain testimony regarding the tax liability of Frank Keenan and of the witness (R. 1784). Notwithstanding that this exhibit had already been introduced against all of the defendants, the court nevertheless directed the jury to consider it only as to the defendant Edward Keenan and not against the other defendants (R.

1809). Motion to strike the grand jury testimony of Edward Keenan and to withdraw a juror and declare a mistrial were made and overruled (R. 1809-1810).

Government Exhibit 354, which was received against all defendants (R. 1366; 1810), charged as overt act No. 11 (R. 15), is a memorandum of an interview with Agents Forman and Freiberger with James Keenan, held on March 22, 1954. Its purpose was to obtain testimony regarding the tax liability of Frank Keenan, brother of the witness, and the tax liability of the witness. This exhibit was read to the jury (R. 1810-1816). Statements with reference to Frank Keenan appear in this interview.

The grand jury testimony of James Keenan, charged as overt act No. 18 (R. 16), was also read to the jury (R. 1820-1844). The jury was instructed that it was to be considered as evidence against James Keenan only (R. 1844).

Government Exhibit 355, which was received in evidence against all defendants (R. 1366; 1844), charged as overt act No. 12 (R. 15), was read to the jury (R. 1844-1849). This was a conference held March 25, 1954, between Agents Forman and Freiberger with Mark Keenan and its purpose was to determine the tax liability of Frank Keenan and of the witness.

Government Exhibit 406, a memorandum of an interview of Mark Keenan taken at February 4, 1957, with Special Agent Simon Levin, charged as overt act No. 15 (R. 16), with reference to the income tax liability of Frank Keenan for the years 1944 through 1955 and the Champlin-Shealy Company for the years 1946 through 1955 (R. 1849); was read to the jury (R. 1850-1885). The court directed that the said exhibit read to the jury was to be considered by them as against Mark Keenan only and not as to the other defendants (R. 1885).

It is indeed difficult to see how the jury could keep in mind the limitations and restrictions as to the exhibits introduced in evidence, nor how they could separate the tremendous amount of testimony and documentary evidence introduced against Petitioner, Frank Keenan, in connection with the Government's "net worth" case, and the testimony and documentary evidence introduced against all of the defendants in an effort to prove the conspiracy charge. After only three or four days of trial, the Trial Judge admitted his personal difficulty in following the testimony in evidence and suggested that the jury might have similar difficulties (R. 558).

None of the defendants was present at the interviews with Agents, or during the Grand Jury testimony of any of the other defendants. There is no evidence that any of the defendants authorized or ratified the contents of the respective interviews and the Grand Jury testimony of the other defendants.

A serious situation exists in connection with the introduction into evidence by the Government of more than 17,000 check stubs; not a single witness testified to the contents of a single check stub. It is impossible to determine what damaging evidence may have been contained in these check stubs.

In two earlier cases before the Court of Appeals for the Seventh Circuit, it condemned the introduction into evidence of a lesser quantity of similar documentary evidence. In the case of *United States* v. *Haupt*, 136 F. 2d 661, at Page 672, the Seventh Circuit Court of Appeals said:

> "We shall briefly refer to some of the more compelling grounds upon which we think defendants' contention must be sustained. As already shown, there were introduced in evidence fourteen statements, the length of which it is difficult to describe. Some idea is

obtained, however, from the fact that they comprise seventy-three pages (fifty-seven typewritten pages and sixteen handwritten), and that some three hours' time (so stated in oral argument) was consumed in reading them to the jury." As there is no dispute but that such statements, or at any rate most of them, were of a highly incriminating nature, no purpose could be served in relating their contents. They were not only incriminating as to the defendant by whom made, but in the main equally incriminating against other defendants. True, as the government asserts, such statements were offered in evidence only against the defendant by whom made, and the court instructed the jury accordingly. A reading of these statements, however, leaves no room for doubt but that they were damaging not only as to the defendants against whom offered but as to all others. We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted. We have equal doubt that any jury, or for that matter any court, could perform such a herculean feat.

"The holding of the Supreme Court in *Anderson* v. *United States*, heretofore discussed in support of our conclusion that the statements were improperly admitted, is also pertinent to the instant discussion. In that case there were eight defendants, some of whom had made confessions and some not. It was held, for the reasons heretofore stated, that the confessions were improperly admitted. The government contended, however, that even so the convictions should not be reversed as to those defendants against whom no confessions were admitted. The court said [318 U. S. 350, 63 S. Ct. 602, 87 L. Ed. . . .] 'The incriminating statements of each petitioner implicated all the others, including those who did not confess. To be sure, the trial court devised a procedure under which the confessions were introduced without mention of the names of the other persons implicated. But their names were in fact revealed in the course of the cross-examination of the confessing petitioners.'"

The Seventh Circuit Court of Appeals handed down a decision in the case of *United States* v. *De Lucia* (unreported), No. 12399, December 31, 1958, in which it held that a statement made by a co-defendant before the Grand Jury, at which De Lucia was not present, was inadmissible and incompetent as to him on the substantive counts, since it was nothing more than hearsay on said counts.

Notwithstanding its previous position set forth in the foregoing two cases, the Court of Appeals ignored and departed from the law announced in these cases in the following language appearing in its Opinion (App. 12a):

> "Mark insists, as do Frank and James Keenan, that statements made by them in 1957 should not have been received into evidence because, it is claimed, the jury could not follow the court's instruction that each such statement was offered only against the defendant who made the statement. Defendants had been furnished with verbatim copies of these statements and had long known the Government would offer them in evidence as the making of each statement was spelled out in the indictment as an overt act. Nevertheless, no motion for a severance was made. In effect, defendants consented to a joint trial at which all defendants and all eleven counts would be tried together. Furthermore, the statements were not confessions but were exculpatory statements made during the life of the conspiracy. We hold these claims of error are without merit."

Certainly the numerous instructions of the court in limiting and restricting evidence in testimony, as heretofore set forth, were manifestly confusing not only to the jury but to the attorneys as well. The test as to the effect of these limiting and restricting instructions is set forth in *Delli Paoli* v. *United States*, 352 U. S. 232, 239-241. There the court stated with reference to such instructions:

> "The determination of this issue turns on whether the instructions are sufficiently clear and whether it was reasonably possible for the jury to follow them."

In holding that the jury could follow the court's instructions in that case, the court continued (page 241):

> "Several factors favor this conclusion: (1) The conspiracy was so simple in its character that the part of each defendant in it was easily understood. *There was no mass trial and no multiplicity of evidentiary restrictions.* * * *" (Emphasis supplied.)

In *United States* v. *Gordon*, 273 F. 2d 177, 183, this Honorable Court observed:

> "A similar issue was before the Supreme Court in *Delli Paoli* v. *United States*, 352 U. S. 232, 77 S. Ct. 294, 1 L. Ed. 2d 278, wherein a judgment of conviction was affirmed by a five to four decision. The majority reasoned that the cautionary instructions of the court were sufficient under the circumstances of that case to safeguard the rights of a co-defendant. The circumstances of the instant case, as we shall point out, are different and observations made by the dissenting members of the court in *Paoli* are pertinent. The dissent states (352 U. S. at page 247, 77 S. Ct. at page 302): 'The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors'. And again (352 U. S. at page 248, 77 S. Ct. at page 303): 'The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds'.
>
> "The circumstances of the instant case are different in at least one important respect, that is, it is doubtful if the testimony under discussion can be properly characterized as incriminating admissions by MacLeod; in fact, they are exculpatory rather than incriminating. It is not discernible how these statements could have been of any material aid to the government's case against MacLeod. *At the same time, they were, as to Gordon, deadly poison.* It is not surprising that the jury convicted Gordon and acquitted MacLeod. That the damaging effect of this testimony was cured by the

> cautionary instructions ignores realities and is contrary to all logic and common sense. Its admission on the flimsy pretext for which it was offered was of such a prejudicial nature as to require a reversal." (Italics ours.)

It must be noted that the overt acts were withdrawn by the Government's attorney (R. 2082); but the memoranda of interviews and the grand jury testimony of the several defendants charged with committing these overt acts were not stricken nor removed from consideration by the jury by any instruction of the Court.

In *Krulewitch* v. *United States*, 336 U. S. 440, 453, this Honorable Court said: "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction."

The supervisory powers of this Honorable Court should be invoked to correct the departure by the Court of Appeals from its own decisions and from the decisions of this Court. This Honorable Court should further determine whether the burden can be cast upon defendants in any trial to avoid the confusion that may be injected by prosecuting attorneys in introducing numerous conflicting exhibits, and particularly interviews with Government Agents and Grand Jury testimony of defendants on trial, each one of which may be "deadly poison" as to other defendants. Surely in the instant case the defendants were not expected to anticipate that the prosecuting attorney would introduce more than three hundred exhibits in an effort to prove a net worth case which was entirely worthless; to anticipate that they would not be given a fair trial; and, whether or not they knew of the existence of the interviews and the Grand Jury testimony before trial, they had a right to expect that the prosecutor would follow the law as set forth in the foregoing cases, *United States* v. *Haupt*, *United States* v. *Anderson*

and *United States* v. *Gordon*, all of which were handed down prior to the trial of the petitioners.

VIII.

Testimony was adduced at the trial regarding Mark Keenan being a "putative" and "targeted" defendant (R. 1694-1697, 2673-2685, 1720-1729). This became an issue before the petit jury. Accordingly, this presented a question of fact for the jury. *Hanson* v. *United States*, 186 F. 2d 61 (8 Cir.); *McNabb* v. *United States*, 123 F. 2d 848 (1941); *Anderson* v. *United States*, 124 F. 2d 58 (1941). See also: *McNabb* v. *United States*, 318 U. S. 332 and *Anderson* v. *United States*, 318 U. S. 350, each reversing the Sixth Circuit's cited decisions.

Notwithstanding this situation the Trial Court refused to give Mark Keenan's requested instructions, or any instructions, pertaining to this important defense theory (R. 3231).

Moreover, the Trial Court restrained Mark Keenan's counsel from arguing this defense theory in summation (R. 3313, 3314). Cf. *United States* v. *Indian Trailer Corporation*, 226 F. 2d 595, 598 (7 Cir.); *Tatum* v. *United States*, 190 F. 2d 612, 617 (D.C.—1951).

The Court of Appeals, in holding there was no error in refusing to give these requested instructions, is in conflict with the Courts of Appeals of other circuits heretofore cited, and in conflict with one of its prior decisions. These conflicts should be resolved by this Court.

IX.

Contrary to the record, the Court of Appeals found that there was *insufficient evidentiary basis* for instructions re-

garding Petitioner, Mark Keenan's contention that the memorandum of Special Agent Levin was illicited by means of "trickery" and "deception." This is an oversight of the facts. The record is replcat with such "evidentiary basis" (R. 1694-1697; 1720-1729; 2605-2607, 2608, 2611-2616; 2625, 2626; 2665, 2669-2671; 2673-2675).

The foregoing goes to the crux of the question of whether the statement was voluntarily made. *Rogers* v. *United States* 340 U. S. 367; *Hoffman* v. *United States*, 341 U. S. 479; *Blumberg* v. *United States*, 222 M. 2d 496 (Cir. 5—1955).

Proper instructions by the Trial Court regarding this question would have left to the jury for determination the question of whether the Petitioner, Mark Keenan, had voluntarily given the testimony used; and whether there was an absence of "trickery" and "deception." *Hanson* v. *United States*, 186 F. 2d 61 (8 Cir.); *Anderson* v. *United States*, 124 F. 2d 58; *United States* v. *Lipshitz*, 132 F. Supp. 519 (D. C. ED., N. Y. 1955).

The Trial Court not only refused to give instruction, or any instruction, regarding the important defense theory of whether a Government Agent illicited a statement from the Petitioner, Mark Keenan, involuntarily (R. 3231), but also stopped his counsel from arguing this matter in summation (R. 3313, 3314, 3319). See *United States* v. *Indian Trailer Corporation*, 226 F. 2d 595, 598.

It is, therefore, submitted the foregoing deprived the Petitioner, Mark Keenan, of a fair trial by jury; and left unanswered the question of whether he was compelled to give evidence against himself.

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 12239 SEPTEMBER TERM, 1958, JANUARY SESSION, 1959

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN FRANCIS KEENAN,
Defendant-Appellant.

No. 12242
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES E. KEENAN,
Defendant-Appellant.

No. 12264
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MARK KEENAN,
Defendant-Appellant.

Appeals from the District Court of the United States for the Eastern District of Illinois, Danville, Illinois.

March 26, 1959.

Before DUFFY, *Chief Judge,* and HASTINGS and PARKINSON, *Circuit Judges.*

DUFFY, *Chief Judge.* On April 30, 1957, an eleven count indictment was filed in the United States District Court for the Northern District of Illinois, charging violation of the Internal Revenue laws and of the conspiracy statute. In the first ten counts John Francis Keenan (herein-

after called Frank Keenan) was the sole defendant. He was charged in Counts 1, 2, 3 and 4 with having wilfully attempted to evade and defeat a large part of his personal income taxes for the years 1950, 1951 and 1952. In Counts 5, 6 and 7, he was charged with having wilfully attempted to evade and defeat the taxes of Champlin-Shealy Company, a corporation, during the same period. Counts 8, 9 and 10 are not before us. In Count 11 it was charged that Frank Keenan, his brothers, James and Mark, and his sons, George and Edward, were engaged in a continuing conspiracy from the end of 1944 to the date of the indictment. The Champlin-Shealy Company was named as a co-conspirator but not as a defendant.

In substance, Count 11 charged that there was a fraudulent deduction on the books and tax returns of the Champlin-Shealy Company of large sums designated as "Sales Expenses" and "Sales Commissions," the bulk of which—while ostensibly paid to the defendants other than Frank Keenan—constituted unreported taxable income to Frank Keenan; and that Frank Keenan used the other defendants as conduits to channel such income to him. Twenty-one overt acts were listed. During the trial, overt acts 15 through 21 were withdrawn.

The cases were transferred by Judge LaBuy to the Eastern District of Illinois. The trial before Judge Platt and a jury lasted seven weeks. Frank Keenan was found guilty on the first seven substantive counts and on the conspiracy count, but was found not guilty as to Counts 8, 9 and 10. James and Mark Keenan were each found guilty on the conspiracy count, the only count in which they were charged. Edward and George Keenan, the sons of Frank, were found not guilty on the conspiracy count, which was the only count in which they were charged. Frank Keenan was given concurrent two-year sentences on each of the eight counts on which he was convicted, and was likewise fined $7,000.00 on each count. James Keenan and Mark Keenan were each fined $5,000.00 and sentenced to imprisonment for one year and a day.

From the evidence, the jury was entitled to believe the following facts: On December 31, 1944, defendant Frank Keenan acquired, at a cost of $65,106.59, all of the stock

of Champlin-Shealy Company which was engaged in the printing business in Chicago. On February 1, 1945, the old corporation was dissolved and a new corporation was formed under the same name. Frank was elected president, and Pauline Ross who had been employed by the old corporation for many years, was elected Secretary-Treasurer. Of the 675 outstanding shares, 673 were issued to defendant, one to Ross and one to a third party. On February 27, 1945, defendant resigned as president and transferred his stock in the corporation to James Keenan, who then was elected president. James paid $13,500.00 for twenty percent of the stock, and held the other eighty percent as nominee for Frank Keenan.

From 1934 to 1950, Frank Keenan was an alderman of the City of Chicago. The Government suggests that his resignation as president was prompted by the Illinois statute which forbade municipal officers from doing business directly or indirectly with the city.

Although Frank Keenan claimed that he had nothing to do with the management of the company from 1945 to the end of 1950, there was substantial evidence that Frank was in *de facto* control of the company. He had his own private office at Champlin-Shealy, and came to the office every week day when he was in Chicago. During this period James was not authorized to sign company checks alone. Frank had the combination to the safe while usually James did not. On several occasions when James learned the combination, and Frank became aware of that fact, the combination was changed. On one occasion in 1948, when James removed some securities from the safe which he put up as a collateral for a bank loan, Frank became angry and the safe deposit box of the company at the bank to which Frank, James and Miss Ross had previously had access, was closed out. A new box was opened to which only Frank and Miss Ross had access. In 1947, the shares of the corporate stock held by James as nominee for Frank were transferred to Georgia Keenan, Frank's wife.

In 1950, Frank was elected to the County Board of Tax Appeals and was no longer employed by the City of Chicago. In November, 1950, Frank and James had a violent disagreement resulting in a fist fight. On Novem-

ber 24, 1950, James resigned as president and defendant's son, George, was elected president. James sold his shares of stock in Champlin-Shealy for $75,000.00. Three days later George resigned and Frank was elected president.

The Champlin-Shealy Company never declared a dividend after the Keenans acquired control. Commencing in January, 1945, a corporate check was made out each week in the amount of $150.00 payable to cash, and on the corporate books was charged to "Sales Expenses." In July, 1947, the weekly amount was increased to $300.00, and in April, 1950, to $400.00. Each week these checks would be cashed and Miss Ross would place the cash received in an envelope marked "Sales Expenses." Sometimes Frank would pick up the envelope, and at other times James would do so. Throughout 1950 Frank and James frequently bought cashier's checks out of their shares of the "Sales Expense" checks. After Frank bought out James' interest in the corporation late in 1950, the $400.00 weekly checks continued to be issued and cashed. Of the proceeds, $100.00 would be sent to James' bank in the form of a cashier's checks, and the other $300.00 would be turned over to defendant in currency. Between 1948 and 1951 several Internal Revenue agents advised Miss Ross that the corporation would have to keep invoices to substantiate deduction of the lump sum "Sales Expense" checks. This never was done.

During the period when the "Sales Expense" checks were being issued, the company also listed on its books expenses incurred for advertising, travel, entertainment, automobile expense, presents for customers, etc. However, these items were substantiated, and were entirely independent of the lump sum weekly checks hereinbefore described. The total amount of unsubstantiated weekly checks issued between 1945 and 1953 and charged to "Sales Expense" was $145,100.00. The practice of cashing these checks continued until April 15, 1954, the day after Frank Keenan was invited in for questioning by Treasury Agents.

Starting in 1946, the company issued numerous checks for "Sales Commissions." Practically all of the proceeds of these checks came into the hands of Frank Keenan—usually by circuitous routes. In 1946, Mark Keenan was credited with $5,200.85 charged to "Sales Commissions."

This was approximately three per cent of the net gross sales. On March 14, 1947, a company check for $5,200.85 was issued to Mark. It was endorsed by Mark Keenan and Miss Ross and was cashed at the bank. Mark received $200.00. A cashier's check for $5,000.00 was purchased and turned over to Frank Keenan.

In 1947 Mark was credited with "commissions" of $13,394.56 representing four and two thirds percent of the total net sales. Frank's twenty-two year old son, Edward, was placed on the payroll in July, 1947, and did some clerical work for the company. He was credited with $6,697.28 representing two and one third percent of the total 1947 net sales. $3500.00 of this sum was paid to Edward four days after he was hired. All of this commission was turned over to Frank Keenan.

James Keenan was credited with $20,091.85 of "Sales Commissions" in 1947. This represented seven percent of total net sales. The same pattern of crediting commissions to the account of James (seven percent), Mark (four and two thirds percent) and Edward (two and one third percent), was followed from 194. until February, 1950. At that time Edward left the company and Frank's other son, George, then twenty-two years old, was placed on the payroll. For the period from March, 1950 to November, 1950, George did only clerical work but was credited with two and one third percent of the total net sales as "Sales Commissions."

On December 1, 1950, the date Frank Keenan was elected president, the corporation authorized a new schedule of commissions under which George would receive six percent of sales, Mark six percent and Frank two percent. These rates remained in force until the end of 1954. During the years 1950 through 1954, George Keenan, although doing only clerical work, was credited with "Sales Commissions" of more than $108,000.00. George turned all of this money over to Frank Keenan.

During the years 1947 through 1954, fifty-nine checks were issued by the company payable to Mark, James, George or Edward which totaled more than $112,000.00. These checks were endorsed by the payee and immediately turned over to Miss Ross to be cashed. The currency was placed in the office safe or in the company's

safe deposit box at the bank. The currency was turned over to Frank Keenan as he requested it or was used to purchase cashier's checks for him.

In addition to the fifty-nine double endorsed checks there were forty-five corporate checks charged against the accounts of James, Mark, Edward or George which totaled more than $154,000.00. The proceeds of these checks were used among other things to purchase securities for Frank Keenan; deposited in his personal bank accounts; used to purchase bank drafts which were sent to California and deposited there to the credit of the Oaks Hotel (owned by Frank Keenan); deposited directly in a California bank in the account of the Oaks Hotel. Checks totaling nearly $42,000.00 were cashed but the disposition of the proceeds could not be traced.

FRANK KEENAN

Frank Keenan maintained a set of personal books which were kept by Helen McGovern, who was his secretary for twenty-three years until April, 1955. In August, 1950, a new account was set up entitled "Loans Payable—Securities." When Miss McGovern would receive large sums of money of which she did not know the source, she would sometimes credit them to "Loans Payable—Securities" and sometimes not. The first time Frank ever told Miss McGovern that he had borrowed money from a particular individual was in December, 1953, when he showed her a check from James. On several occasions the auditor Kaempfer attempted to allocate the "Loans Payable" and the "Loans Payable—Securities" accounts but he never was able to do so.

On September 3, 1954, defendant filed a financial statement with a California bank. He certified his only liability was an $84,000.00 mortgage on the Oaks Hotel. The liability item entitled "Due to Partners, Employees, Relatives * * *" was left blank.

This detailed statement of the transactions involving the "Sales Expense" checks and the "Sales Commission" checks is made necessary because of the argument on this appeal by Frank Keenan that all of the sums received by him from these sources were loans to him from his brothers, James and Mark, and from his sons, Edward and

George. In effect, Frank Keenan challenges the sufficiency of the proof relating in particular to the first four counts of the indictment.

On the first four substantive counts the main issue which the jury had to resolve was whether the bulk of the $115,683.93 paid by the corporation as "Sales Commissions" to Mark and James during the years in question and all of the $50,715.77 paid to Frank's sons in the same period, were, in fact, loans to Frank Keenan. If they were not, clearly such sums were unreported income upon which Frank had paid no income tax. By its verdict the jury rejected Frank's claims that they were loans. There is abundant evidence in this record to support that conclusion.

Frank Keenan strongly urges that the great amount of testimony and evidence introduced for the purpose of proving a "net worth" case was prejudicial error; that the large volume of exhibits received in evidence confused and overwhelmed the jury.

The Government did endeavor to establish its case by two lines of proof: a) specific items of unreported income, and b) the net worth method. With the proof so clear as to specific items of unreported income, it is somewhat difficult to understand why resort was had to the net worth method. However, there may well have been reasons sufficient in the minds of those in charge of the prosecution why it was prudent to have two strings to their bow. In any event, we cannot say there was prejudice to the defendants amounting to reversible error where no lack of good faith is evident in the adoption of the trial strategy which was used.

We are of the view that the jury's verdict that Frank Keenan was guilty of the charges in Counts 5, 6 and 7 is amply supported by the record before us. Much of the evidence which we have heretofore detailed is pertinent in considering these three counts which relate to the alleged wilful atempt of Frank Keenan to evade and defeat the taxes of Champlin-Shealy Company for the years 1950, 1951 and 1952. The evidence supports the charge that large sums paid out by the corporation and charged to "Sales Expense" and "Sales Commissions" were not legitimate payments for expenses actually incurred. The

jury was justified in believing such payments were merely a means of siphoning off unreported profits of the company for the personal benefit of Frank Keenan who, with his wife, was the *de facto* owner of eighty percent of the corporate stock until 1950, and ninety percent of the stock thereafter.

Frank Keenan claims that the charges against him in Counts 1 and 5 are barred by the statute of limitations. Count 1 charges commission of the offense therein described "on or about the fifteenth day of March, 1951." The individual tax return of Frank Keenan and wife was filed March 14, 1951. Count 5 charges that on or about March 15, 1951, Frank Keenan attempted to evade and defeat the taxes due by Champlin-Shealy Company for the year 1950. This return was filed March 13, 1951.

The indictment herein was returned on April 30, 1957, six years and forty-six days after the date of the commission of the offenses described in Counts 1 and 5. The pertinent statute of limitations bars prosecution after six years except "Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended * * *" Section 3748a, Internal Revenue Code 1939, 26 U.S.C.A.

A supplement to the record shows that a complaint was, in fact, filed before a Commissioner on March 13, 1957. However, it is undisputed that this complaint or the record thereof was not in the District Court files at the time of the trial. Government's counsel and counsel for the defendants incorrectly assumed that it was on file, and the Government offered no proof to show that prosecution was not barred by the statute.

Frank Keenan relies upon two Fifth Circuit cases, *White* v. *United States*, 216 F. 2d 1, and *Flemister* v. *United States*, 260 F. 2d 513. In *White*, the question was brought into focus by a petition for rehearing. The appellant there pointed out that the Commissioner's records had not, in fact, been forwarded to the clerk at the time of the trial, and that the trial judge had, in ruling on motions based on the statute of limitations, incorrectly assumed such records were in the file. The court said, at pages 7 and 8: "If in fact the papers had not been so transmitted at the time of trial, then they had not become

in any sense a part of the record upon which the District Court could rely in ruling as a matter of law that the prosecution was not barred by the statute of limitations." The Court of Appeals refused to direct a judgment of acquittal but ordered a new trial.

In the *Flemister* case, similar confusion existed. When the district judge denied defendant's motion to dismiss, he said he took judicial notice of the proceedings before the Commissioner "which have been transmitted to the Clerk of the District Court." On appeal the record showed that the Commissioner's records had not been forwarded. It also showed that a complaint had not been filed with the Commissioner; that the only proceeding before the Commissioner was the signing of an affidavit averring the truth of the facts which were subsequently made the basis of the indictment. The court held that the signing of the affidavit did not amount to the "institution" of a complaint before the Commissioner within the six-year period.

The holding of these two cases adequately supports the proposition that a trial judge errs in overruling a motion to dismiss when he relies, through judicial notice, on something that does not exist in the record.

We do not think that either case is applicable to the situation before us. The trial judge below was never given an opportunity to rule on the point. The motion to dismiss raised the issue of the statute of limitations only with respect to Count 11. The amendment to this motion was likewise directed only to Count 11. Motions for judgment of acquittal and for a new trial did not raise the issue of limitations at all. In fact, trial counsel for Frank Keenan expressly disavowed any intention to raise the statute of limitations as a bar to the first ten counts.

We hold that as no objections were raised in the pleadings or upon the trial, the Government was not required to prove that the prosecution was not barred by the statute of limitations. We hold further that the defendant is in no position to raise the point for the first time on this appeal. Had this point been timely raised below, there would have been ample opportunity for the Commissioner to file the records with the District Court.

We have considered the claims of Frank Keenan that prejudicial and erroneous instructions were given to the jury and that error was committed in failing to instruct the jury in other respects, particularly with reference to the withdrawal of overt acts 15 through 21. It would unnecessarily prolong this already lengthy opinion to discuss these points in detail. We merely say that we think these claims are without merit.

Frank, as well as the other defendants, claim that the prosecuting attorney was guilty of prejudicial conduct. There is, indeed, basis for some criticism as to the manner in which the prosecuting attorney conducted himself. At times he seemed to forget the admonition in *Berger* v. *United States*, 295 U. S. 78, 88, that a United States Attorney is the representative of a sovereignty whose obligation is to govern impartiality "* * * and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done * * *." See also *United States* v. *Levi*, 7 Cir., 177 F. 2d 827.

Although the quotation from the *Berger* case refers to the United States Attorney, the same standard is, of course, applicable to attorneys sent by the Department of Justice to prosecute a criminal charge as happened in the case at bar. However, we have finally concluded that in the setting of the evidence in this case, there was no prejudicial error in this respect, and we so hold.

CONSPIRACY COUNT

We next consider Count 11 which charged conspiracy. Frank, James and Mark Keenan were all found guilty on this count. Defendants argue a fatal variance existed between the charge in the indictment and the proof in that the proof showed, if anything, a number of smaller independent conspiracies. Defendants rely heavily on *Kotteakos* v. *United States*, 328 U. S. 750.

We hold the jury was justified in finding from the evidence there was one continuing general conspiracy to defraud the Government of the taxes due from defendant and the Champlin-Shealy Company. The manipulation by which the "Sales Commission" checks over a period of years were ostensibly paid to James and Mark, endorsed by them, and then converted into currency which was paid

over to Frank Keenan, points to a general continuing conspiracy. There can be no qustion but that James and Mark knew the part the other played in the conspiracy. As an illustration: On December 28, 1950, the company issued two checks, one to James for $5,000.00 and one to Mark for the same amount. Mark got James' check by mistake and endorsed it; George got Mark's check by mistake and he endorsed it. The checks were exchanged so that the proper endorsements could be written in by James and Mark above the incorrect endorsements. This establishes a pattern of knowledge by James and Mark of the continued conspiracy during the period in question, and the part each played therein.

We think the *Kotteakos* case is clearly distinguishable. There the central figure through whom fraudulent applications for housing loans were processed, had pleaded guilty and was not before the court. The indictment sought to link in one conspiracy thirty-two defendants who had, each for his own purpose, used the same intermediary. There was no showing that each of the thirty-two had knowledge of the activities of the other or that there was any central scheme in operation. That situation does not obtain in the case at bar.

MARK KEENAN

Much of the evidence hereinbefore quoted in considering Frank Keenan's appeal, is pertinent on the appeal of Mark Keenan. Several contentions made by Mark have already been discussed with reference to Frank's appeal. We shall not repeat them.

Mark was not a salesman. During the entire period between 1946-1954, when Mark was credited by the corporation with $174,522.84 of "Sales Commissions" he had a full time job with the City of Chicago. He never obtained any orders for the company but did drop into the company office once or twice a week to read the newspapers. Mark was never a director or officer of the Champlin-Shealy Company nor did he receive a salary.

Mark testified at the trial that Frank had owed him $83,000.00 ever since 1953; that he never kept records of the amounts turned over to Frank; that such records appeared in the company's books, although he admitted

he never had seen the inside of those books. In 1955, Mark borrowed $600.00 and $800.00 from a bank on dates when the corporate books showed he had balances due him of $41,614.68 and $51,949.42 respectively. Mark steadfastly insisted at the trial that all proceeds of checks payable to him which were turned over to Frank were loans from him to Frank. The jury didn't believe him.

Mark complains of "deception" and "trickery" on the part of Government Agents Freiberger and Foreman, claiming that they elicited a statement from him on the representation they were investigating his civil tax liability. He also complains because of the admission into evidence of the statement taken from him by Special Agent Levin. Mark also asserts error because the court refused to give requested instructions to the jury on these matters. We do not think there was sufficient evidentiary basis for the proposed instructions, hence no error was committed. Nor was there error because the Government did not call Agent Freiberger. The defendants had Freiberger under subpoena and might have called him if they wished. We also find no error in the admission into evidence of a transcript of Mark Keenan's interview with a Treasury Agent.

Mark insists, as do Frank and James Keenan, that statements made by them in 1957 should not have been received into evidence because, it is claimed, the jury could not follow the court's instruction that each such statement was offered only against the defendant who made the statement. Defendants had been furnished with verbatim copies of these statements and had long known the Government would offer them in evidence as the making of each statement was spelled out in the indictment as an over act. Nevertheless, no motion for a severance was made. In effect, defendants consented to a joint trial at which all defendants and all eleven counts would be tried together. Furthermore, the statements were not confessions but were exculpatory statements made during the life of the conspiracy. We hold these claims of error are without merit.

Counsel for Mark Keenan strongly insists the trial court erred in admitting grand jury testimony given by Mark at a time it is now claimed he was a putative and

targeted defendant. He also claims Mark was compelled to give evidence against himself before the grand jury. James Keenan makes a similar argument.

Mark was only a potential defendant when he testified. The statement of the court in *United States* v. *Benjamin*, 2 Cir., 120 F. 2d 521, 522 is pertinent. The court said: "It is to be remembered that the appellant had not the constitutional privilege to refuse to testify which belongs to a defendant on trial. He was subject to call as a witness and only had the right of any witness to decline to give answers when interrogated which might tend to incriminate him [citing cases]. As Professor Wigmore has said, the privilege is 'an option of refusal and not a prohibition of inquiry.' Wigmore Evidence 2 Ed. § 2268 * * *"

Mark Keenan claimed he was intimidated by a threat made by Judge Barnes that he would send him to jail. Mark was summoned to appear before the April, 1957 grand jury. He was instructed as to his constitutional rights. He stated that on the advice of his attorney, he would refuse to answer any and all questions regardless of whether his answers would tend to incriminate him. The Government applied to Judge Barnes for an order directing him to answer certain questions. It was then that Judge Barnes said: "There seems to prevail around this courthouse on the Fifth Amendment that if somebody, if one claims the Fifth Amendment, you can't compel him to answer any questions. That is a gross mistake, and I guess we will have to send somebody to jail to assure people it isn't the fact." Thereafter, Mr. Busch, one of the counsel for defendants, agreed that the questions should be answered. It was further agreed that Mark and James would be permitted to consult with their counsel at any time while they were appearing before the grand jury. None of Mark's testimony before the grand jury was read to the trial jury except as it was used on cross examination. We hold that there was no error in this respect.

Mark makes several other claims of error. We have carefully considered each of them. We find no prejudicial error existed with respect to any of these contentions.

JAMES KEENAN

James Keenan was found guilty of conspiracy as charged in Count 11. Many of the claims made upon behalf of James have been covered in our discussion of claims of error made by Frank and Mark Keenan. These points will not be again discussed.

James Keenan left the corporation in 1950. During the trial his counsel frequently objected to evidence on the ground the transactions occurred between 1951 and 1955 which he claimed could not be binding on James. The trial court made it clear that any defendant could make an objection at any time but if such objections involved constant repetition of a theory of defense, same should be done out of hearing of the jury. The court later instructed the jury "If you believe from all of the evidence and under these instructions beyond a reasonable doubt that a defendant was a member of the conspiracy as charged in the indictment at any time, such conspirator remained a member of the conspiracy until it is shown that he has taken some affirmative or definite step, or steps to disassociate himself from the alleged conspiracy. Disassociation from the Champlin-Shealy Company in itself is not such an affirmative step."

James takes vigorous exception to that part of the charge that disassociation from the corporation was not, in itself, a sufficient affirmative step to disassociate the defendant from the conspiracy. In view of the testimony which clearly established a continuance of the conspiracy long after James left, and the participation of James in that conspiracy, we hold the instruction was not erroneous.

Equally without merit is James' contention that the trial court forgot to instruct the jury that the last seven overt acts listed in Count 11 had been withdrawn by the Government. We think it clearly established that the trial judge's secretary retyped the indictment deleting the last seven overt acts, and it was this retyped indictment that was given to the jury.

Counsel for James argues that his conviction was barred by the statute of limitations claiming he committed no overt act within the six-year period in furtherance of the

conspiracy. Of course, this is not necessary as long as an overt act was committed by any of the co-conspirators within the six years prior to the return of the indictment on April 30, 1957. Moreover, we think there was ample proof that James did commit overt acts within the six-year period, such as falsely stating to the Treasury Agents in 1954 that his "Sales Commissions" turned over to Frank were merely loans, and that Frank owed him approximately $85,000.00.

Other claims of error made by James which have not been heretofore specifically mentioned or covered in discussions of claims of error made by Frank and Mark, are without merit and are hereby overruled.

The judgment of conviction as to John Francis Keenan in No. 12239; the judgment of conviction as to Mark Keenan in No. 12264, and the judgment of conviction as to James Keenan in No. 12242 are each

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

Chicago 10, Illinois.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. No. 12239 JOHN FRANCIS KEENAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Eastern District of Illinois.

Thursday, March 26, 1959.

Before DUFFY, *Chief Judge*, and HASTINGS and PARKINSON, *Circuit Judges*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

Chicago 10, Illinois.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. No. 12242 JAMES E. KEENAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Eastern District of Illinois.

Thursday, March 26, 1959.

Before DUFFY, *Chief Judge*, and HASTINGS and PARKINSON, *Circuit Judges*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

Chicago 10, Illinois.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. No. 12264 MARK KEENAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Eastern District of Illinois.

Thursday, March 26, 1959.

Before DUFFY, *Chief Judge*, and HASTINGS and PARKINSON, *Circuit Judges*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

Chicago 10, Illinois.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
No. 12239
JOHN FRANCIS KEENAN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
No. 12242
JAMES E. KEENAN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
No. 12264
MARK KEENAN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Illinois.

Thursday, June 11, 1959.

Before DUFFY, *Chief Judge*, and HASTINGS and PARKINSON, *Circuit Judges*.

IT IS ORDERED BY THE COURT that the petitions of defendants-appellants John Francis Keenan, James E. Keenan, and Mark Keenan, for a rehearing of this cause be, and the same are hereby, DENIED.

Certificate of Clerk of the United States Court of Appeals for the Seventh Circuit that the foregoing pages contain a true copy of the Opinion of the said Court dated March 26, 1959; the judgments of said Court dated March 26, 1959; and the Order of said Court denying Petitions for Rehearing dated June 11, 1959. Said certificate is dated July 27, 19[illegible]

STATUTES AND RULES INVOLVED.

Title 26 U. S. C. A. § 1456(b): Penalties.

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(d) Person defined. The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Title 26 U. S. C. A. § 3748: Periods of limitation —(a) Criminal Prosecutions.

No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be five years for offenses enumerated in section 4047(e) (relating to unlawful acts of revenue officers or agents) and except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such

falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document).

For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years. The time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings. Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district.

Title 18 U. S. C. A. § 371: Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Illinois Revised Statutes, Chap. 24, Sec. 9-91:

No municipal officer shall be interested, directly or indirectly, in any contract, work, or business of the municipality or in the sale of any article, whenever the expense, price or consideration of the contract, work, business, or sale is paid either from the treasury or by any assessment levied by any Statute or Ordinance. No municipal officer shall be interested, directly or indirectly, in the purchase of any property which (1) belongs to the municipality, or (2) is sold for taxes or assessments, or (3) is sold by virtue of legal process at the suit of the municipality.

Rules 5 (b) and (c), Rules of Criminal Procedure:

Proceedings Before the Commissioner.

(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of

his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) Preliminary Examination. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed, and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 292

JOHN FRANCIS KEENAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–15a) is reported at 267 F. 2d 118.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1959 (Pet. 18a) and a petition for rehearing was denied on June 11, 1959. On July 1, 1959, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to August 10, 1959, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Government's reconstruction of petitioner Frank Keenan's net worth (which constituted part of the proof on certain of the counts upon which he was convicted) was prejudicially erroneous because it conflicted with his own books.

2. Whether the trial court improperly amended the indictment by deleting certain of the overt acts alleged in the conspiracy count, where prior to trial the defendants had moved to strike such acts and where, at the trial, they agreed to such deletion.

3. Whether the evidence was sufficient to support the verdict.

4. Whether the Court of Appeals correctly held that petitioner Frank Keenan had raised no contention in the district court that two counts of the indictment were barred by the statute of limitations.

5. Whether the indictment properly alleged that overt acts in furtherance of the conspiracy were committed during the statutory period of limitations.

6. Whether the prosecutor was guilty of prejudicial misconduct at the trial.

7. Whether petitioners were prejudiced by the volume of evidence introduced by the Government.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account

for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b)).

18 U.S.C.:

SEC. 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

STATEMENT

On April 30, 1957, an 11-count indictment was filed in the United States District Court for the Northern District of Illinois, charging violations of the internal

revenue laws and the conspiracy statute. The defendants were petitioner John Francis Keenan (referred to throughout the trial, and hereinafter, as Frank Keenan), his brothers James and Mark Keenan, and his sons George and Edward Keenan. Frank Keenan was the sole defendant named in the first ten counts, which charged him with wilfully attempting to evade and defeat (1) his 1950-to-1952 individual income taxes, to the extent of $61,645.30, and (2) the 1950-to-1952 corporate income taxes of the Champlin-Shealy Company ("the corporation"), to the extent of $163,503.71, in violation of Section 145(b) of the Internal Revenue Code of 1939; and (3) wilfully assisting in and procuring the preparation and presentation of corporate income tax returns in which substantial false and fraudulent deductions were claimed, in violation of Section 3793(b)(1) of the Code. (Pet. 1a; R. 4–11)[1] Count XI charged that all the defendants were engaged in a continuing conspiracy from the end of 1944 to the date of the indictment wilfully to defraud the United States of income taxes due from Frank Keenan and the corporation, in violation of 18 U.S.C. 371. The overt acts specified in that count made it clear that the basic plan of the conspiracy was the fraudulent deduction on the books and tax returns of the corporation of $484,439.23 designated as "Sales Commissions", the bulk of

[1] The appellants' appendix in the Court of Appeals, consisting of five printed volumes with pages numbered 1 to 3430, is designated "R." The supplemental record certified to the Court of Appeals by the District Court on January 19, 1959, is designated "Supp. R."

which—while ostensibly paid to the defendants other than Frank Keenan—actually constituted unreported taxable income to him. (R. 11–16.)

The cause was transferred to the Eastern District of Illinois, and after a jury trial lasting seven weeks the three petitioners were found guilty on the conspiracy count.[2] Petitioner Frank Keenan was also found guilty on the seven substantive counts which charged him with evasion of the income taxes of himself and the corporation. Frank Keenan was fined $7,000 on each of the eight counts on which he was convicted, and given concurrent two-year prison sentences on each count. Petitioners James Keenan and Mark Keenan were each fined $5,000 and sentenced to prison for a year and a day. (R. 1–3, 271-272, 319.)

The Court of Appeals for the Seventh Circuit unanimously affirmed the convictions. (Pet. 1a–15a).

THE CONSPIRACY

The evidence to support the verdict on the conspiracy count may be summarized as follows:

All the capital stock of the corporation, a Chicago printing firm, was acquired by Frank Keenan in December, 1944. (R. 766–767.) Although there were changes in the ownership of minority interests from time to time, Frank Keenan was the true owner of 80% of the corporation's stock between 1945 and

[2] George and Edward Keenan were found not guilty on the conspiracy count, the only count in which they were charged. (R. 272.)

1950, and 90% thereafter. (R. 774–777, 941–942, 1733, 1811–1812, 2825.) Pauline Ross, the office manager, owned the remaining 10% after 1950. (R. 769–770, 776, 943–944, 960–962, 1132, 1143.) Miss Ross never received any dividends on her stock (R. 951, 1132), but her salary was increased from $115 a week to $270 a week on the same day that she became a stockholder (R. 943, 1142–1143).[3]

During the period 1946 through 1954, several hundred thousand dollars were withdrawn from the corporation by the Keenans as "Sales Commissions" (Govt. Exs. 409–A, 410), and virtually all of the proceeds of these checks came, usually by circuitous routes, into the hands of Frank Keenan. The amounts thus credited on the corporation's books to Frank Keenan, his brothers (James and Mark Keenan) and his sons (George and Edward Keenan) were as follows (Govt. Ex. 409–A):

George Keenan	$108,035.35
Edward Keenan	26,324.01
Mark Keenan	174,522.84
James Keenan	104,887.81
Frank Keenan	36,448.30
Total	$450,218.31

George, Edward, Mark and James were not salesmen. George and Edward, both of whom were put on the corporate payroll at the age of 22, did only clerical work inside the office for nominal salaries

[3] Prior to December 1, 1950, Miss Ross' salary had increased gradually from $75 a week in 1945 to $115 a week in 1950. (R. 915, 943.)

and turned all of their "Sales Commissions" over to their father, Frank Keenan. (R. 857, 979, 998, 1735–1738, 1785, 2875–2876.)[4] Mark Keenan never obtained any orders for the corporation and came into the office only once or twice a week for a half hour or an hour to read the newspapers. (R. 794, 2641–2644.) During the entire period he had a full time job with the City of Chicago (R. 1176–1182). Mark kept only $9,000 or $10,000 of his "Sales Commissions" for his own use, turning the remainder over to Frank Keenan. (R. 100, 2584, 2586, 2636–2637, 2660.) James Keenan served as the ostensible head of the corporation at a salary of $200 a week between 1945 and 1950 (while Frank Keenan was an alderman of the City of Chicago)[5] and turned all of his "Sales Commissions" over to Frank Keenan. (R. 774–775, 911, 954–955, 1731, 1811–1812, 1815, 2332, 2936.)

These "sales commissions" were channeled to Frank Keenan through a series of intricate financial

[4] The "Sales Commissions" ostensibly paid to George, Edward, Mark and James Keenan were reported by them on their individual tax returns as though they had received the money. The corporation, however, paid their individual income taxes. For the years 1950 through 1952, the total income taxes paid by the five Keenans on an individual basis on the "commissions" purportedly received by them were $63,344.07 less than the tax which Frank Keenan would have had to pay had he reported all the "commissions" as his own income. (R. 951–952, 1937, 2011–2012, 2053–2058; Govt. Ex. 417). See *infra*, p. 11.

[5] An Illinois statute forbade municipal officers from doing business, directly or indirectly, with the City. (R. 513–514, 1812; 24 Smith-Hurd Illinois Annotated Statutes (Permanent ed.), Sec. 9—91.)

transactions. During the years 1947 through 1954, 59 checks totalling $112,223.65 were issued by the corporation to Mark, James, George or Edward, endorsed by the payee, and immediately turned over to Miss Ross, the office manager, who endorsed and cashed them. The currency was placed in the office safe or in Frank's safe deposit box at the bank, and was then turned over to Frank as he requested it, or was used to purchase cashier's checks for Frank. Frank got the entire $112,223.65, and did not report any of it as income on his tax returns. (R. 779–783, 790–829, 897–903, 1165–1166, 2993–2995.) In addition, there were 45 other corporate checks totalling $154,727.01, which were charged against the accounts of James, Mark, Edward or George Keenan on the corporate books, and which were disposed of as follows (R. 830–881, 994–996, 1084–1098, 1165–1169, 1380, 1381, 1937–1940; Govt. Ex. 410):

Number of Checks	*Disposition*	*Amount*
16	Deposited to Frank's personal bank accounts	$63,150.00
4	Used to purchase securities for Frank	23,972.99
6	Endorsed by payee and cashed by Frank's personal secretary	10,800.00
3	Deposited in the bank account of a California hotel (the Oaks Hotel) owned by Frank	15,000.00

Number of Checks	Disposition	Amount
16	Disposition uncertain. Checks were cashed but the proceeds could not be traced	$41,804.02
	Total of 45 checks	$154,727.01
	Add: 59 "double-endorsement" checks, all the proceeds of which were turned over to Frank	112,223.65
	Total of 104 checks analyzed	$266,950.66

In 1954, after the above facts had been unearthed by the Treasury agents, they interviewed the Keenans, all of whom claimed that the transfer of these "commission" monies to Frank merely represented loans to him, and that as a result Frank owed his sons and brothers large sums. (R. 93–94, 96, 100, 103, 106, 1732.) A few months later, however, on September 3, 1954, Frank filed a financial statement with a California bank, in which he certified that his *only* liability was an $84,000 mortgage on the Oaks Hotel, owed to a Mrs. Barrington. (R. 1430, 1438; Govt. Ex. 365.)

Other evidence also indicated that the sums were not loans to Frank. For example, although James testified at the trial that Frank owed him about $43,000 in 1950 and $120,000 in 1957, and Frank testified "I think I have almost every cent that Jim

Keenan has, at the present time" (R. 2936), James was borrowing from his bank between 1948 and 1954 sums ranging from $1,000 to $5,000, often putting up his car as security (R. 593–603, 2332). In 1951 James, upon buying land from Frank, paid him $23,000 and gave him a note for the balance. (R. 2001, 2331, 2869.) In 1955 Mark borrowed sums of $600 and $800 from a bank, although he testified at the trial that Frank has owed him $83,000 ever since 1953. (R. 562–565, 2584, 2586, 2660.) On October 4, 1951, George borrowed $100 from the corporation.[6] At that time the balance due him on the corporate books was $13,470.79. Nevertheless, weekly deductions of $5 or $10 were made from George's modest salary until the $100 loan was repaid in full on December 27, 1951. (R. 977–979.) In August, 1950, there was set up on Frank's personal books (maintained by his secretary) a new account entitled "Loans Payable—Securities." When his secretary would receive large sums of currency of which she did not know the source,[7] she would sometimes credit it to "Loans Payable—Securities" and sometimes not. (R. 1381–1383, 1386–1388, 1453–1468, 1520–1523, 1530–1531.) Frank was unable to tell his accountant how much he owed to each member of his family, and although the

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[6] One day earlier, on October 3, 1951, the corporation had issued a check to George for $1,750. It was endorsed by George and Frank's personal secretary and cashed. (R. 979.)

[7] On some occasions Miss Ross would send envelopes containing substantial amounts of currency to Frank Keenan's secretary who, on his instructions, would deposit it in his bank account or use it to buy cashier's checks for him. (R. 1400–1403, 1468–1469, 1472.)

accountant attempted on several occasions to allocate the "Loans Payable" and "Loans Payable—Securities" accounts, he was never able to do so except on an arbitrary basis. (R. 1570–1573, 1576–1577, 1584, 2172–2174, 2202–2203.)

THE SUBSTANTIVE COUNTS

Evidence to support the verdict against Frank Keenan on the substantive counts may be summarized as follows:

The counts alleging that Frank Keenan had wilfully attempted to evade his individual income taxes for 1950, 1951 and 1952 were proved by two separate methods: (a) specific items of unreported income, and (b) the net worth method.

(a) The Government proved that if the "Sales Commissions" ostensibly paid to Mark, James, George and Edward had been reported in full as income on Frank's tax returns, he would have owed the following amounts over and above the taxes reported by Frank and his brothers and sons attributable to the "Sales Commissions" (R. 2054–2058; Govt. Ex. 417):[5]

1950	$17,981.05
1951	35,158.28
1952	10,204.74
Total	$63,344.07

[5] See n. 4, *supra*, p. 7.

Frank Keenan admitted at the trial that he had used all the "Sales Commissions" given him by his brothers and sons for his own purposes. (R. 2993–2995.)

(b) The Government made a thorough investigation of the assets, liabilities, expenditures, possible sources of nontaxable funds, and other financial affairs of Frank Keenan and his wife, for the period beginning December 31, 1943, and ending December 31, 1952. (R. 1962–1964, 1978–1981, 2004–2006.) On the basis of increases in net worth and nondeductible expenditures, the true net income and tax, compared with the amounts reported on the returns, were as follows (R. 1967–1979, 2045–2048; Govt. Exs. 414, 416):

Year	Net Income		Income Tax	
	Reported	Corrected	Reported	Corrected
1950	$16,551.36	$53,973.98	$3,194.32	$19,612.96
1951	40,653.63	84,654.39	14,172.96	42,081.54
1952	18,911.09	49,024.88	4,814.22	20,840.42
Total	$76,116.08	$187,653.25	$22,181.50	$82,534.92

Frank Keenan testified at the trial that he had between $30,000 and $35,000 in undeposited cash at the end of 1949, but admitted that he had about the same amount throughout the years covered by the indictment and that it did not vary more than $5,000 from the end of one year to the end of another. (R. 2810, 2980.) Other "starting point" proof showed (1) the

combined net worth of Frank and Mrs. Keenan at the end of each year from 1943 to 1949; (2) that he had substantial liabilities at the end of 1943; and (3) that on the basis of the income tax return filing history of Frank and Mrs. Keenan since 1930, plus his salary from the City of Chicago during the years when it was not subject to federal income tax, they could not have accumulated a substantially greater starting point net worth than that shown in the Government's reconstruction. (R. 343–344, 1664–1671, 1963–1964, 1968.)

The counts alleging that Frank Keenan had wilfully attempted to evade the taxes of the corporation for the years 1950, 1951 and 1952, were proved mainly by evidence of the fraudulent deduction of the "Sales Commissions" (*supra*, pp. 5–11). The amounts by which corporate income and taxes were understated were as follows (R. 2030–2037, 2401–2402; Govt. Exs. 415, 415A):

Year	Net Income		Income and Excess Profits Taxes	
	Reported	Corrected	Reported	Corrected
1950	$36,803.05	$123,326.24	$10,707.28	$56,673.96
1951	32,709.97	116,596.01	11,100.31	70,318.07
1952	6,278.83	84,101.36	1,883.65	46,899.47
Total	$75,791.85	$323,933.61	$23,691.24	$173,891.50

ARGUMENT

1. Petitioner Frank Keenan attacks (Pet. 16–21) the accuracy of certain figures used in the Government's reconstruction of his net worth.* These specific challenges to the figures were not raised at the trial, are without substance, and raise only the factual question whether there was sufficient evidence to sustain the conviction—a question resolved against petitioner by the Court of Appeals after a careful review of the evidence.

Petitioner's contention rests upon the implied assumption that variations between his own books (transcribed by a Treasury agent in 1952, R. 1352–1357, and introduced into evidence as Government Exhibit 348) and the Government's reconstruction of his net worth (Govt. Ex. 414) must be resolved in his favor. But net worth cases almost invariably involve such variations; if the taxpayer's books accurately reflected his income, there would be no need to resort to the net worth method. By its verdict, the jury found that petitioner's books did not accurately reflect his income. The Court of Appeals held that this verdict was fully supported by the proof, which involved not only the net worth method, but also specific items of unreported income (see *supra*, pp. 11–13). Indeed, the defendants' own accountant

* Petitioners pose the question (Pet. 2–3, 16, 21) in terms of whether the court below was justified in holding that the Government's "good faith" excused alleged errors in the net worth figures. But the Court of Appeals made no such holding. Its reference to "good faith" (Pet. 16) was in response to petitioner's argument below—abandoned here—that the introduction of net worth proof was unnecessary.

witness testified that for the year 1950—the only year as to which petitioner makes specific challenges to the Government's figures [10]—he would have arrived at exactly the same unreported income shown by the Government (Govt. Ex. 414), if he had treated as income the "sales commissions" turned over to Frank Keenan by his brothers and sons (R. 3055–3056).

2. Petitioners contend (Pet. 21–23) that the deletion of seven overt acts from the conspiracy count (Supp. R. 18–21) was "an unauthorized and fatal amendment of the original Count 11 as returned by the Grand Jury" (Pet. 22). The deletion, however, was made at petitioners' urging and was, therefore, expressly authorized by Rule 7(d) of the Federal Rules of Criminal Procedure, which provides that "The court on motion of the defendant may strike surplusage from the indictment or information."

The conspiracy count as returned by the grand jury contained 21 overt acts. (R. 11–16.) Before trial, all defendants moved to strike the last seven overt acts as surplusage (R. 18, 21, 22, 25), later amending the motion to cover all 21 overt acts (R. 40–42). Judge LaBuy denied the motion. (R. 51–55.) At the trial,

[10] Even if petitioner's challenges were accepted, the effect would be only to reduce the understatement of his 1950 net income by $7,885.07 (increase in loans payable: $3,764.71; decrease in securities: $2,110.00; decrease in investment in the corporation: $2,010.36). See Pet. 18. The total amount by which petitioner understated his 1950 net income, however, was more than $37,000. See *supra*, p. 12. The Government is not required to establish the precise amount of unreported income; it is sufficient that there has been a substantial understatement. *Holland* v. *United States*, 348 U.S. 121, 138.

after the Government had rested, counsel for James Keenan argued that overt acts such as the last seven (R. 16) "are definitely not in furtherance of a conspiracy, but within the meaning of the *Grunewald* decision, and therefore they are not applicable, and they are barred by the statute of limitations * * *." (Involving the making of false statements during the Government's investigation, R. 2081–2082.) The Government then agreed that those overt acts should be withdrawn from the jury's consideration (R. 2082). The court inquired whether the defense attorneys would prefer to have the seven acts blocked out from the indictment or to have them left in and then have the jury instructed as to their deletion. Both sides agreed it would be better to delete them. (R. 3188–3189, 3190.)

In these circumstances, petitioners cannot now complain because the trial court followed their request and physically deleted the surplusage from the indictment. As the Notes of the Advisory Committee on the Rules pointed out (Note to Rule 7(d)), "By making such a motion [to strike surplusage], the defendant would, however, waive his rights" to urge that "an indictment may not be amended."

3. Petitioners challenge (Pet. 23–27) the sufficiency of the evidence on all counts, arguing that payment of "Sales Commissions" is not a crime and citing defense testimony that it was customary for Chicago printing firms to pay from 10% to 15% in sales commissions. The issue in the case, however, was not whether the purported commissions were reasonable in amount, but whether they were "sales commissions" or mere shams utilized in a tax evasion scheme.

See *United States* v. *Ragen*, 314 U.S. 513. The witnesses relied upon by petitioners testified on cross-examination that they were talking about salesmen who actually went out and brought in printing business. (R. 2219–2220, 2224–2226.) In the instant case the Government proved that even though Frank Keenan's brothers and sons were not salesmen, and did not bring in any business,[11] their accounts were credited with some $414,000 of purported "sales commissions" during a ten-year period, with corresponding charges to the "Sales Commissions" account; that the entire $414,000 was deducted as expenses on the corporation's book and tax returns; and that practically all of the money ostensibly paid to Mark, James, Edward and George Keenan was paid over, usually by a circuitous route, to Frank Keenan. (*Supra*, pp. 5–11.) In short, the evidence showed, as the court below held, that the "Sales Commissions" were "not legitimate payments for expenses actually incurred" but "merely a means of siphoning off unreported profits of the company for the personal benefit of Frank Keenan * * *" (Pet. 7a–8a); and that there "is abundant evidence in this record to support" the jury's rejection of "Frank's claims that [the 'Sales Commissions'] were loans" (Pet. 7a).

4. Petitioner Frank Keenan contends (Pet. 27–31) that his conviction under Counts I and V (relating to

[11] Although James Keenan claimed that he controlled the important National Railroad Adjustment Board account, it was obtained by the corporation on an annual bid basis with little or no competition. (R. 1190–1193, 1196, 1199–1201, 2242–2249.)

the 1950 tax returns of himself and the corporation) was barred by the statute of limitations. No such contention was made in the district court; indeed, it was expressly waived there (R. 22–26, 41–42, 2085–2086).[12] We submit that the Court of Appeals correctly held (Pet. 9a) that "as no objections were raised in the pleadings or upon the trial, the Government was not required to prove that the prosecution was not barred by the statute of limitations." The cases which petitioner cites as in conflict with the decision below (*Flemister* v. *United States*, 260 F. 2d 513 (C.A. 5), and *White* v. *United States*, 216 F. 2d 1 (C.A. 5)) are distinguishable, since in both of them the defendants raised the limitations point in the district court.

5. Petitioners attack (Pet. 31–34) the sufficiency of the overt acts set forth in the conspiracy count, primarily on the ground that some of them occurred more than six years prior to the return of the indictment. But the only requirement for conviction of conspiracy is that at least one overt act in furtherance thereof must have occurred within the statutory period. Since that requirement admittedly was here satisfied, it is immaterial that other overt acts took place outside the period, or that more overt acts were alleged than are necessary. Cf. *Braverman* v. *United*

[12] Petitioner's plea based on the statute of limitations related solely to Count XI (R. 22–26). Although petitioner contends that he amended this plea to cover the entire indictment, the amendment related only to "said count," *i.e.*, Count XI (R. 41–42). At the trial, petitioner stated that he was not raising any limitations issue with respect to the other counts (R. 2085–2086).

States, 317 U.S. 49, 53; *Capriola* v. *United States,* 61 F. 2d 5 (C.A. 7). Indeed, since Count XI alleged that the conspiracy had continued over a twelve-year period (from December, 1944 until April 30, 1957), it was hardly surprising that some of the overt acts alleged had taken place prior to April 30, 1951.

6. Petitioners state (Pet. 34–38) that they were prejudiced by three incidents of alleged misconduct by the prosecutor during the course of a seven-week trial: (a) the reading of an Illinois statute to the jury; (b) asking an allegedly prejudicial question while cross-examining James Keenan; and (c) suggesting, while cross-examining Frank Keenan, that he had evaded taxes in years prior to those covered by the indictment.

(a) The Illinois statute which prohibits municipal officers from doing business with the city (*supra* p. 7, n. 5) was highly relevant to the Government's case. It tended to show (1) why Frank Keenan transferred 80% of the corporation's stock to James in 1945; (2) that the stock did in fact belong to Frank at all times; (3) that Frank was in a position where he could not appear to be receiving income from the corporation; and hence (4) that the "Sales Commissions" being turned over to Frank were income, and not loans. (*Supra,* pp. 5–11; R. 774–775, 1812, 2948–2949.) There was evidence that the corporation was doing business with the city while Frank was still an alderman (R. 2348, 2349, 2945–2946), and was soliciting other business from the city during those years (R. 1845, 2571–2572).

(b) The purpose of the prosecutor's question about James Keenan's "sick" wife (Pet. 36) was to show that James was staying home with her, and was not travelling about the country on corporate business.[13] This was pertinent with respect to whether certain payments to James were legitimate corporate expenses.

(c) The prosecutor's questions to Frank Keenan about the income tax returns he filed in the 1930s and early 1940s were designed to demonstrate that the Government's reconstruction of his starting point net worth—which depended considerably upon his tax return filing history (*supra*, pp. 12–13)—was correct. It was defense counsel who raised a question with respect to these old returns (R. 2737–2738, 2780–2781, 2789–2793, 2808–2809), for the evident purpose of casting doubt on the starting point proof. The contention—first made on appeal—that when the prosecutor went into the matter on cross-examination (R. 2976–2980), he was intimating that Frank had "committed crimes other than those charged in the Indictment" (Pet. 38), is thus without substance.

7. Petitioners complain (Pet. 38–48) that they were prejudiced by the large amount of evidence introduced by the Government, because the jury could

[13] James Keenan claimed to have travelled extensively on behalf of the corporation in connection with the National Railroad Adjustment Board account. (See p. 17, n. 11, *supra*.) The Government proved, however, that of representatives of organizations accounting for 83% of the corporation's N.R.A.B. business, seven had never met James and two had seen him only in Chicago. (R. 1215, 1225–1226, 1231–1232, 1239–1242, 1267, 1271–1272, 1282, 1296, 1309–1312, 1336–1338, 1347, 1653, 2245–2249, 3035–3038.)

not "keep in mind the limitations and restrictions as to the exhibits introduced" (Pet. 43), particularly the persons against whom the various documents were admitted. But the large volume of proof was necessitated because of the intricate financial transactions through which petitioners had endeavored to conceal their tax fraud scheme. As the Court of Appeals pointed out (Pet. 12a), the defendants had been furnished with "verbatim copies" of statements which they made to Treasury agents, and they "had long known the Government would offer them in evidence as the making of each statement was spelled out in the indictment as an overt act. Nevertheless, no motion for a severance was made. In effect, defendants consented to a joint trial at which all defendants and all eleven counts would be tried together." In these circumstances, their belated claims of prejudice have no substance. Cf. *United States* v. *Haupt*, 136 F. 2d 661, 672 (C.A. 7). The cases upon which petitioners rely (Pet. 43–47) involved peculiar factual situations and highly incriminating statements; in the instant case, however, as the Court of Appeals noted (Pet. 12a), "the statements were not confessions but were exculpatory statements made during the life of the conspiracy."[14]

[14] Petitioners' contention (Pet. 48–49) that there was sufficient evidence to justify the trial court in submitting to the jury the question whether, when Mark Keenan testified before the grand jury, he was a "'putative' and 'targeted' defendant," and whether a statement which he gave to Treasury agents in 1957 was obtained by "trickery," raises only factual questions which the Court of Appeals correctly resolved against him.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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REPLY BRIEF OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I.

The Government makes a succinct answer to the complaint of Petitioner, John Francis Keenan, that the Government failed to prove a net worth case against him, by

suggesting at page 14 of its Brief, "Petitioners pose the question (Pet. 2-3, 16, 21) in terms of whether the court below was justified in holding that the Government's 'good faith' excused alleged errors in the net worth figures. But the Court of Appeals made no such holding. Its reference to 'good faith' (Pet. 16) was in response to petitioner's argument below—abandoned here—that the introduction of net worth proof was unnecessary."

The Court of Appeals ignored entirely the argument and computations appearing in Mr. Keenan's Brief to show that there was not an accurate starting point as of December 31, 1949. Examination of the original Brief and Argument of Mr. Keenan, filed in the United States Court of Appeals for the Seventh Circuit (pp. 38-49), shows conclusively that the Government's starting point was inaccurate in that Government Exhibit 414 and the testimony of the agent who prepared it and testified with respect thereto, disclosed the absence of a loans payable item of $35,466.58. This also appeared on Government's Exhibit 348, prepared by Agent Forman. There is nothing in the record to show that this item was erroneous or that its appearance on Government's Exhibit 348 was based on untruthful books. This is not a truthful and honest variation between his books, as transcribed on Government's Exhibit 348, and the Government's reconstruction of his net worth, as shown on Government's Exhibit 414.

The variation exists because of the arbitrary and unjustified action by Agent Levin, who prepared Exhibit 414. This is shown by Mr. Levin's testimony. As pointed out on page 19 of the Petition, his explanation as to why he omitted these loans from his summary is that he "requested Mark Keenan, George Keenan and Edward Keenan to bring in verification of the amounts, and he never received the same, and he was not satisfied with the information these

defendants gave about the loans 'based on all of the evidence in the case'" (R. 2042-2043). Details of the loans payable account, as shown on the second page of Exhibit 348, from the year 1943 through 1951, are shown in a separate analysis attached to Exhibit 348, page AA. None of these items had anything to do with Mark Keenan, George Keenan and Edward Keenan, and needed no verification from them.

Another defect in the Government's "net worth" case is the omission therefrom of an asset belonging to Frank Keenan which was known to the Government. Reference to Government's Exhibit 348 indicates conclusively that Special Agent Forman included the cash surrender value of Frank Keenan's life insurance policies with the Travelers Life Insurance Company among his assets from the years 1943 through 1949; in 1943 it amounted to $14,561.65, and it increased yearly until it amounted to $28,223.60 in 1949. Here the Government *knew* of this asset, and Special Agent Levin did not include it in his "net worth" computation and summary.

Since there is a false and inaccurate starting point, the understatements of net worth of Mr. Keenan for the taxable years of 1950, 1951 and 1952 must fail, according to the formula prescribed by this Court in *Holland* v. *United States*, 348 U. S. 121, 132.

II.

In answering the Petitioners' contention that the deletion of overt acts 15 through 21 was an unauthorized and fatal amendment of Count II of the Indictment and deprived the Court of jurisdiction to try the Petitioners on said count, the Government cites 7(d) of the Federal Rules of Criminal Procedure, which provides that "The court on motion of the

defendant may strike surplusage from the indictment or information" and points out that the deletion was made at the request of the Petitioners.

The question to be determined, obviously, is whether the seven overt acts are surplusage. If they are not surplusage, then the conduct of the Court in deleting the same is subject to the impact of *Ex parte Bain*, 121 U. S. 1, 9, and the other cases cited at pages 22 and 23 of the Petition.

It follows further, under such circumstance, that the consent of the defense counsel to the deletion of the overt acts does not affect the situation. See cases cited at page 23 of Petitioners' Brief. This is particularly true if the deletion of the counts deprived the Court of jurisdiction over the subject matter described in Count 11 and of the right to try the defendants on that count. Jurisdiction of the subject matter cannot be conferred upon the Court by consent of the litigants; it only arises by a proper pleading.

III.

In arguing that the commissions paid to the brothers and sons of John Francis Keenan by the Champlin-Shealy Company were excessive, the Government overlooks that the total amount of sales of the corporation from 1945 through 1954, as set forth in John Francis Keenan's Petition (pages 56,57) totals *Three Million, six hundred nineteen thousand, five hundred fifty-nine dollars* and seventy-seven cents ($3,619,559.77).

The Government disallowed practically all of the compensation and expenses paid to John Francis Keenan's brothers and sons. It is apparent that the Government takes the position that none of these parties is entitled to any compensation merely because they delivered most of their compensation to Petitioner, John Francis Keenan.

The compensation of all of the brothers and sons was fixed in advance by the corporate resolution. All the payments appeared clearly on the books.

It was not necessary for any of the said parties to go out on the street to seek business. They could seek it through correspondence, over the telephone or in any other manner. If a customer was once obtained by one of the parties, that party was entitled to commissions as long as that customer remained with Champlin-Shealy Company, even if nothing more than good service stimulated the customer's continued business.

In the only case cited by the Government on the question of reasonableness of compensation paid by a percentage of the sales, *U. S.* v. *Ragen*, 314 U. S. 513, the defendants destroyed corporate books and back-dated employment contracts and corporate minutes "as if they were actual events contemporaneous with the false dates of recording."

In the instant case, the *entire* deduction is not fabricated. Every payment of compensation, and deduction therefor, appears on the books of Champlin-Shealy Company, in its income tax returns and in the respective returns of the brothers, and sons of Petitioner, John Francis Keenan.

The business of Champlin-Shealy Company was respectable and legitimate. Hundreds of cases of reasonableness, or lack of it, on salaries or other forms of compensation paid to employees are collected in the Prentice-Hall Federal Tax Service, 1954, Par. 11,702-C through Par. 11,703-J (Cases collected under Eight Categories); Commerce Clearing House Standard Federal Tax Reporter, 1954, Par. 161, 269 (Cases arranged by type of industry or business); Research Institute of America Federal Tax Coordinator, Pages 11,841 to 11,852 (Chart of numerous cases analyzed in tabular form). Numerous methods of paying compensation, in-

cluding the percentage basis, are collected in the work of Washington and Rothschild, "Compensating the Corporate Executive", Revised Edition. In all of these sources, counsel has been unable to find a single instance where a legitimate business man and a legitimate enterprise were charged with attempting to defeat and evade the income tax law by the payment of unreasonable salaries or compensation.

IV.

The reply to the Government's Brief on the question of the Statute of Limitations (pages 17-18), is amply answered by reference to pages 27-31 of Petitioners' Petition for Writ of Certiorari.

V.

The reply to the Government's Brief as to the sufficiency of the overt acts is amply answered by reference to pages 31-34 of Petitioners' Petition for Writ of Certiorari.

VI.

(a.) The Government defends the complaint of John Francis Keenan that reading the Illinois Statute which prohibits municipal officers from doing business with the City and punishes the same as a crime, was justified because there was evidence that the corporation was doing business with the City while John Francis Keenan was an alderman. To support that statement, the Government refers to R. 2348-2349, 2945-2946, 1845, 2571-72. Reference to these Record pages indicates that the Government's statement is highly inaccurate. Nothing appears at Record page 1845 to show that Champlin-Shealy Company obtained any business from the City of Chicago while John Francis Keenan

was an alderman, except for the memorandum of interview between Mark Keenan and Government Agents, in which (at page 1845) Mark Keenan stated to Government Agents that his duties consisted of responsibility for servicing City, County, Sanitary District accounts and accounts of a few lawyers. There is nothing in the evidence to show which city's account Mark Keenan was servicing.

Reference to Record pages 2348 and 2349 shows that James Keenan obtained business for Champlin-Shealy Company from the Municipal Court of Chicago, which is separate from the City of Chicago and was created by an Act entitled "An Act in relation to a municipal-court in the City of Chicago," approved May 18, 1908, Illinois Revised Statutes, Chapter 38, Sections 358 to 426. The Municipal Court is an autonomous entity, separate from, and independent of, the City of Chicago. This evidence was brought out *after* the close of the Government's case, when James Keenan took the stand in his own defense.

Examination of Record pages 2945-46 does not show that Champlin-Shealy Company did any business with the City of Chicago. Frank Keenan was on the stand and he was asked whether he heard Government's Exhibit 354 read to the jury. This was a statement of James Keenan to Agent Forman which was an atempt to impeach Frank Keenan by an unauthorized statement of his brother, a statement *made out of Frank Keenan's presence*. The question asked of Frank Keenan on cross-examination was: "Sir, did you hear James state—Government's Exhibit 354, he stated that the reason he held all of the Champlin-Shealy stock in his name was because his brother Frank, a city alderman at the time, had been advised by an attorney that State law forbade aldermen from doing business with the city."

This statement contains no proof that Champlin-Shealy did business with the City of Chicago while John Francis

Keenan was an alderman. Frank Keenan testified that the contents of James' statement was not a fact (R. 2947). Reference to Record pages 2571-72 does not indicate that any business whatsoever was done between Champlin-Shealy Company and the City of Chicago.

(b) The Government explains that the Prosecutor's question about James Keenan's sick wife was to show that James was staying home with her and was not traveling about the country on corporate business; that this question was pertinent with respect to whether certain payments to James were legitimate corporate expenses. That inquiry could have been made in proper, dignified and unprejudicial language and the Government's explanation constitutes no excuse for the type of question asked.

(c) It is difficult to understand how the prejudicial cross-examination of Frank Keenan about the correctness of his income tax returns as compared with the built-up tax liability computed by Government witness, Mr. Harlan, could have cast any information on the authenticity of the Government's starting point (December 31, 1949), for the purpose of proving a net worth case against Frank Keenan. Government's Exhibit 414, which was introduced for the purpose of setting forth the Government's summary of its evidence to prove a net worth case against Frank Keenan, did not go back to the years 1930 to 1940. Government's Exhibit 414 began with December 31, 1948. The objectionable questions were asked with respect to the taxable years 1937, 1941 and 1943. See page 37 of Petition.

VII.

The portion of the Government's Brief (pages 20-21) with respect to the prejudicial effect of the avalanche of evidence introduced, particularly in connection with the non-proved net worth case of Government, is amply answered at pages 7 to 48 of the Petition.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1959.

No. 292

JOHN FRANCIS KEENAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

JAMES E. KEENAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MARK KEENAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING.

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CHAMPLIN-SHEALY COMPANY, CHICAGO

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PETITION FOR REHEARING.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, John Francis Keenan, James E. Keenan and Mark Keenan, respectfully petition this Court to grant a rehearing of this cause, this Honorable Court having denied the Petitioners' Petition for a Writ of Certiorari on October 19, 1959.

Petitioners show unto this Court that on November 2, 1959, on motion of the Petitioners, the United States Court of Appeals for the Seventh Circuit ordered that the issuance of its mandates be withheld pending the disposition of a Petition by the Petitioners to the Supreme Court of the United States for a rehearing of the aforesaid order of this Court denying the Petition for a Writ of Certiorari.

The Petitioners file this Petition for Rehearing within the provisions of Rule 58 of the Rules of the Supreme Court of the United States. This Petition is filed within twenty-five days after the decision of this Court denying the Petition for a Writ of Certiorari (October 19, 1959). The Petitioners present to this Court other substantial grounds which were available to Petitioners but not previously presented (e. g. *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, 50).

I.

In his opening statement, Mr. Howard B. Gliedman, the Special Assistant to the Attorney General, told the jury the following (R. 332-333):

> "Now you may wonder why these years, 1950, '51 and '52, were picked for indictment and we refer to other years. Well, those years prior to 1950 are barred because of the Statute of Limitations; except for the conspiracy. Years subsequent to 1952 the Government has not audited and that will be shown to you on the stand. They are not to be considered by you, but just on the count of conspiracy, as to certain acts which we will show you after 1951, 1950 and 1952. That is the reason we have those three years, although the evidence is going to show you lots of other years. The ones before that were barred by the Statute; the ones after that that were not ready at the time of the action."

This statement was highly prejudicial in that it contains clear intimation to the jury that the defendants had com-

mitted crimes in violation of the Internal Revenue Code prior to 1950 and subsequent to 1952. The statement to the jury, "That is the reason we have these three years, *although the evidence is going to show you lots of other years*," indicates a deliberate and calculated intention to introduce the prejudicial cross examination of Frank Keenan with respect to his income tax for the years 1934, 1937, 1939, 1942 and 1943 (R. 2977-2982). For the sake of brevity, Petitioners' counsel calls this Court's attention to the argument on pages 36 to 38 of the Petition for Certiorari.

II.

At pages 21 to 23 of the Petition for Certiorari, the Petitioners argued that the withdrawal by the Government of Overt Acts 15 through 21 and the deletion of the said overt acts from Count 11 of the Indictment constituted a fatal amendment thereof and deprived the Court of jurisdiction to try all of the Petitioners on said Count 11.

The modified Indictment was given to the jury so that they would not have an opportunity to know that there were these overt acts, 15 through 21. The Court, in modifying Count 11 and delivering the said modified count to the jury during their deliberations, overlooked the fact that he had read the *entire* Indictment to the jury on the day the trial commenced. This is so indicated in the opening statement of the Prosecuting Attorney, Mr. Gliedman, where he stated to the jury (R. 333):

> "We are going to show you each and every item that his Honor read to you yesterday when he read you the *entire* indictment in this case. We are going to show you that those allegations in that indictment are *completely accurate* in the Government's case, and then we are going to ask you to bring in the proper verdict in this case."

At the close of the Government's case motions were made by Petitioners' counsel to strike overt acts 15 through 21 because they occurred after the conspiracy had ended. After arguments on the motion for judgments of acquittal the Government's attorney withdrew the said overt acts. Immediately prior to the withdrawal of these overt acts, and after arguments with respect thereto, the court stated (R. 2081): "I will say two things on that right now. They will be taken to the jury, and the jury instructed that they will not consider them as overt acts—I have forgotten the numbers of them."

No instruction, however, was given to the jury with respect to the withdrawn overt acts 15 through 21. In describing count 11 to the jury, during his instructions, the court stated (R. 3446): "In furtherance of, in the execution of and for the purpose of carrying into effect the object, designs and purposes of said conspiracy, the co-conspirators did do and perform overt acts. I shall not read to you the overt acts *but you may read them as set forth in count 11 of the indictment.*" (Italics ours.)

Inasmuch as the jury had heard the said overt acts read to them at the opening of the case, an instruction should have been given to them that they were not to consider in any manner the said overt acts which were read to them. It certainly must have been confusing to the jury, since the respective statements of certain defendants which were described in the said overt acts were actually read to the jury during the presentation of the Government's case.

III.

The Petitioners have pointed out in their Petition for Certiorari numerous specific instances of prejudicial evidence introduced by the Government, over objection, and of

prejudicial conduct, examination of witnesses and statements by the Prosecuting Attorney. These are in addition to the foregoing prejudicial matters presented herein. The cumulative effect of so many errors cannot be considered harmless and should be considered as having influenced the verdict of the jury and to have deprived the petitioners of due process of law. See *Kotteakos* v. *United States*, 328 U. S. 750, 763-765, 66 S. Ct. 1239, 90 L. Ed. 1557; *Bihn* v. *United States*, 328 U. S. 633, 637, 66 S. Ct. 1172, 90 L. Ed. 1485; *Bollenbach* v. *United States*, 326 U. S. 607, 614, 66 S. Ct. 402, 90 L. Ed. 350.

Upon reconsideration, counsel trusts that your Honors will grant certiorari upon this Petition for Rehearing.

Respectfully submitted,

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Of Counsel.

CERTIFICATE OF COUNSEL.

MYER H. GLADSTONE, counsel for petitioners, hereby certifies that this petition for rehearing is presented in good faith and not for delay. This petition is restricted to grounds specified in Rule 58 of the Rules of the Supreme Court of the United States.

MYER H. GLADSTONE,
Counsel for Petitioners.